85-342

No. 85-

Supreme Court, U.S.
FILED
AUG 28 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

THEODORE PAINTER, JR.
Appellant,

v.

STATE OF ALASKA
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
FOR THE STATE OF ALASKA

JURISDICTIONAL STATEMENT

C. Walter Ebell*
JAMIN, EBELL, BOLGER & GENTRY
P.O. Box 4269
Kodiak, AK 99615
(907) 486-6024

* *Counsel of Record* *Counsel for Appellant*

aBCD Legal Printers, Seattle, Washington

QUESTION PRESENTED FOR REVIEW

Whether the promulgation of Federal Tanner Crab Regulations pursuant to a Fishery Management Plan adopted by the North Pacific Fishery Management Council in accordance with the Fishery Conservation and Management Act preempts state regulation of the tanner crab fishery outside the state's territorial waters and within the Fishery Conservation Zone as established by the Fishery Conservation and Management Act.

LIST OF ALL PARTIES TO PROCEEDING

The caption on the cover of the brief contains the names of all parties to this proceeding.

TABLE OF CONTENTS

	Page
Question Presented For Review	i
Parties To Proceedings	i
Opinion Below	1
Jurisdiction	2
Constitutional Provisions, Statutes and Regulations Involved	2
Statement of the Case	3
Substantial Federal Question Presented	4
1. Review of the Order of the Supreme Court of the State of Alaska is Timely and Appropriate.	4
2. This Case Is One of First Impression Regarding a State's Authority to Regulate a Fishery in the Fishery Conservation Zone After a Fishery Management Plan and Implementing Federal Regulations Have Been Promulgated for a Particular Fishery Under the Fishery Conservation and Management Act.	5
3. The Adoption of Federal Tanner Crab Regulations Preempts The State's Authority to Regulate the Tanner Crab Fishery In The Fishery Conservation Zone.	7
Conclusion	19

Page

Appendices:

Appendix A - Opinion of Court of Appeals of Alaska A-1

Appendix B - Order of Alaska Supreme Court B-1

Appendix C - Notice of Appeal C-1

Appendix D - Constitutional Provisions D-1

Appendix E - United States Statutes E-1

Appendix F - Federal Regulations F-1

Appendix G - Alaska Statutes G-1

Appendix H - Alaska Regulations H-1

Appendix I - Cooperative Enforcement Agreement Between the Government of the United States and the State of Alaska I-1

TABLE OF AUTHORITIES

Cases

Bethlehem Steel Co. v. N.Y. Labor Rel. Bd., 330 U.S. 767 (1946) 9

Campbell v. Hussey, 368 U.S. 297 (1961) 8

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 4

Local No. 438 Construction & General Laborers' Union v. Curry, 371 U.S. 542 (1963) 4

Mercantile National Bank at Dallas v. Langdeau, 371 U.S. 555 (1963) 4

Pennsylvania v. Nelson, 350 U.S. 497 (1955) 9

People v. Weeren, 607 P.2d 1279 (Cal.), *cert. denied*, 449 U.S. 839 (1980) 6

Ray v. Atlantic Richfield Company, 435 U.S. 151 (1978) 8

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 8

State v. F/V Baranof, 677 P.2d 1245 (Alaska), *cert. denied*, ____ U.S. ____, 105 S.Ct. 98 (1984) 6,10

State v. Sterling, 448 A.2d 785 (R.I. 1982) 18-19

Statutes

AS 16.05.475 10

16 U.S.C. §1801 3

16 U.S.C. §1811 5

16 U.S.C. §1812 3,5,15

16 U.S.C. §1852(h)(1) 5

16 U.S.C. §1853 5

16 U.S.C. §1854 5

Page

16 U.S.C. §1856(a) 10,12,13,14,*passim*

28 U.S.C. §1257 2,4

Rules and Regulations

5 AAC 35.400 3

5 AAC 35.505 3

5 AAC 35.510(1) 3

50 C.F.R. §671.1 7

Other Authorities

Cong. Rec. H. 9971 (daily ed., Dec. 16, 1982) 16,17

Deshler's Procedure in the U.S. House of Representatives, Rule 16.1 14

H.R. Report 97-549, 97th Cong. 2d Sess. (1982) 16

Magnuson Fishery Conservation and Management Act, Amendments of 1983, P.L. 97-453 15

Magnuson Fishery Conservation and Management Act, Amendments of 1984, P.L. 98-623 15,17

Senate Committee on Commerce and National Ocean Policy Study, 94th Cong. 2d Sess., *A Legislative History of the Fishery Conservation and Management Act of 1976* 10,11,12,13

Senate Report 97-519, 97th Cong. 2d Sess. (1982) . . . 15-16

Standing Rules of the Senate, Rule XXVIII, §2 14

No. 85-

IN THE

Supreme Court of the United States

October Term, 1985

THEODORE PAINTER, JR.
Appellant,

v.

STATE OF ALASKA
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
FOR THE STATE OF ALASKA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the Court of Appeals for the State of Alaska is reported at 695 P.2d 241 (Alaska App. 1984), a copy of which is attached hereto as Appendix A. The order of the Supreme Court for the State of Alaska denying appellant's petition for hearing to review the decision of the appellate court is not reported. A copy of the order is attached hereto as Appendix B.

JURISDICTION

The State criminal complaint filed against appellant for alleged unlawful fishing was dismissed by the District Court of Alaska on the grounds that the State of Alaska lacked jurisdiction to prosecute. The State appealed and on February 22, 1985, the Court of Appeals of Alaska reversed the District Court's ruling. On May 31, 1985, the Supreme Court of Alaska's order denying appellant's petition for hearing seeking review of the decision of the Court of Appeals was entered. On June 5, 1985, Notice of Appeal to the Supreme Court of the United States was filed with the Supreme Court of Alaska. The jurisdiction of this Court is conferred by 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitutional Provisions (App. C, *infra*):

U.S. Const. art. VI, cl. 2

United States Statutes (App. D, *infra*):

Magnuson Fishery Conservation and Management Act of 1976, 16 U.S.C. §§1801, 1811-12, 1851-57, 1860-61.

Federal Regulations (App. E, *infra*):

50 C.F.R. §§671.1 -671.27	Tanner Crab off Alaska

Alaska Statutes (App. F., *infra*):

§ 16.05.475	Registration of Fishing Vessels
§ 16.05.720	Penalties
§ 16.05.920	Certain Acts Made Unlawful
§ 16.10.210	Unlawful Sale or Offer Prohibited

Alaska Regulations (App. G., *infra*):

5AAC35.400	Description of Statistical Area
5AAC35.410	Fishing Seasons
5AAC35.500	Description of Statistical Area
5AAC35.505	Description of Districts
5AAC35.510	Fishing Seasons

STATEMENT OF THE CASE

Appellant, THEODORE PAINTER, JR., was charged in a criminal complaint with commercial fishing for tanner crab in violation of state regulation 5 AAC 35.510(1). Painter, who was fishing legally in the Cook Inlet district, 5 AAC 35.400, north of the latitude of Cape Douglas, was accused of fishing illegally in the Kodiak district, 5 AAC 35.505, south of the latitude of Cape Douglas. The parties stipulated that all of the alleged unlawful fishing at issue took place beyond Alaska's territorial sea and within the Fishery Conservation Zone (FCZ) as defined by the Magnuson Fishery Conservation and Management Act (FCMA), 16 U.S.C. §1801, *et. seq.* The District Court of Alaska dismissed the complaint on the grounds that the state did not have jurisdiction over tanner crab fishing within the FCZ because a Fishery Management Plan (FMP) had been adopted by the North Pacific Fishery Management Council for tanner crab off Alaska and a comprehensive set of regulations to implement that plan had been promulgated by the Commerce Department.

The State of Alaska appealed this decision to the Court of Appeals of Alaska. The Court of Appeals reversed, ruling that the state did have jurisdiction to regulate tanner crab fishing activities beyond its 3-mile territorial waters, and remanded the case to the District Court for trial. The court found that the promulgation of a FMP and federal regulations pertaining to the tanner crab fishery did not preempt state regulations regarding the same fishery, but rather that preemption is triggered only by direct conflict between state and federal regulations. The Court of Appeals based this decision on its interpretations of other cases involving the application of the FCMA to other fisheries where no FMP or federal regulations had been promulgated.

Appellant filed a petition for hearing with the Supreme Court of Alaska seeking review of the Court of Appeals' decision arguing that the Court of Appeals incorrectly concluded that a direct conflict must exist between two regulatory schemes in order for federal regulations to preempt state regulations. Review was denied by order of the court; and thereafter, on June 5, 1985, Appellant filed a notice of appeal to this Court with the Supreme Court of Alaska.

SUBSTANTIAL FEDERAL QUESTION PRESENTED

1. Review of the Order of the Supreme Court of the State of Alaska is Timely and Appropriate.

The order of the Alaska Supreme Court denying Appellant's petition for review is a final, reviewable judgment under 28 U.S.C. §1257. The federal question raised by Appellant in the Alaska court and before this Court is whether federal regulations promulgated pursuant to a comprehensive Fishery Management Plan under the Fishery Conservation and Management Act preempt state regulations when the state regulations attempt to regulate conduct outside the state's territorial waters. The Court of Appeals for the State of Alaska reversed the District Court's dismissal based on preemption and remanded for trial. The Supreme Court for the State of Alaska denied Appellant's petition for hearing seeking review of the decision of the Court of Appeals. The Supreme Court's denial falls within the class of judgments treated as final for purposes of review, even before trial on the merits. because the judgment "finally determines claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949); *Local No. 438 Construction & General Laborers' Union v. Curry*, 371, U.S. 542, 549 (1963).

The federal question of preemption has been finally determined by the decision of the Alaska Supreme Court denying Plaintiff's petition for hearing and is not subject to further review in Alaska state courts. A determination now of the federal preemption question involved in this action serves the finality requirements of 28 U.S.C. §1257 by avoiding duplicative proceedings. *Mercantile National Bank of Dallas v. Langdeau*, 371 U.S. 555, 558 (1963).

2. This Case Is One of First Impression Regarding a State's Authority to Regulate a Fishery in the Fishery Conservation Zone After a Fishery Management Plan and Implementing Federal Regulations Have Been Promulgated for a Particular Fishery Under the Fishery Conservation and Management Act.

The FCMA creates a complex federal administrative structure to exercise the "exclusive fishery management authority", 16 U.S.C. §1812(a), of the United States over the fish resources of the fishery conservation zone (FCZ), 16 U.S.C. §1811. The principle entity responsible for devising conservation and management measures for the waters off Alaska is the North Pacific Fishery Management Council. 16 U.S.C. §1852. The basic device prescribed by Congress for the conservation and management of FCZ resources off Alaska is the fishery management plan (FMP). 16 U.S.C. §§1852(h)(1), 1853 and 1854. The adoption of a fishery management plan for tanner crab off Alaska by the North Pacific Fishery Management Council and the implementation of that plan by the Secretary of Commerce through the promulgation of federal regulations has preempted any attempt by the State of Alaska to regulate the tanner crab fishery in the FCZ. The tanner crab FMP addresses tanner crab management so comprehensively that under the supremacy clause it displaces any authority of the State to manage tanner crab fishing in the FCZ.

To date, no case arising under the FCMA has been heard by this Court. The case at bar presents the first opportunity for this Court to settle and determine whether a state may continue to regulate fishing conduct outside its territorial waters and within the FCZ after a FMP and federal regulations have been adopted pursuant to the FCMA regarding a particular species.

Past cases have dealt with state regulation of fisheries in which a federal plan and regulations had not been promulgated under the FCMA. For instance, in *State v. F/V Baranof*, 677 P.2d 1245 (Alaska), *cert. denied*, ____ U.S. ____ 105 S. Ct. 98 (1984), the Supreme Court for the State of Alaska upheld state regulation of king crab fishing within the FCZ, but because no federal king crab regulations had been promulgated at the time, the inquiry was restricted to the question of whether Congress occupied the field of regulation of king crab fishing by enacting the FCMA. The Court made it clear that the lack of federal king crab regulations and the prospect of the king crab fishery being totally unregulated in the event the FCMA preempted all state extraterritorial regulation were of central importance to its opinion upholding state jurisdiction in the FCZ.

> A holding that the FCMA preempted all state regulations in the FCZ, even in the absence of the promulgation of federal regulations, would frustrate the primary purpose of the FCMA, which is to provide proper management to insure the fisheries are not depleted . . . It is difficult to believe that Congress contemplated preempting state efforts to conserve fishing resources in the *interval* between passage of the Act and adoption of federal regulations covering a specific species of fish. A contrary conclusion would conflict with the Act's purposes.

677 P.2d at 1251 (emphasis added).

Similarly, in *People v. Weeren*, 607 P.2d 1279 (Cal.) *cert. denied*, 449 U.S. 839 (1980), the California Supreme Court upheld provisions of the state's Fish and Game code regulating broadbill swordfish fishery in the FCZ. The court recognized the state's interest in preserving its valuable fish population, which absent the state regulations, would not be accomplished. "Furthermore, the state laws here at issue present no conflict with federal swordfish policy because no federal rules in that field have yet been promulgated under the FCMA". 607 P.2d at 1286.

However, the "interval" of authorized state regulation to which the Alaska Supreme Court referred in *Baranof* ended when the federal government adopted its tanner crab regulations exercising exclusive fishery management authority over that species in the FCZ.

3. The Adoption of Federal Tanner Crab Regulations Preempts The State's Authority to Regulate the Tanner Crab Fishery In The Fisheries Conservation Zone.

The stated purpose of the federal tanner crab regulations is as follows:

> *Purpose and Scope:*
>
> (a) This part regulates fishing for Tanner crab by vessels of the United States within that portion of the Bering Sea and Gulf of Alaska over which the United States exercises exclusive fishery management authority. These regulations implement the Tanner crab fishery management plan developed by the North Pacific Fishery Management Council.

50 C.F.R. §671.1 (1983)

The state no longer has any legitimate reason to exercise extraterritorial jurisdiction and must acquiesce to federal regulatory control in the FCZ as intended by Congress when it passed the FCMA and the Department of Commerce when it promulgated the tanner crab regulations. The prospect of an unregulated fishery does not exist in this case and the adoption of a comprehensive federal regulatory scheme precludes state enforcement of its regulations outside its territorial boundaries.[1]

---

[1] State of Alaska Fish & Wildlife officers may enforce the Federal Tanner Crab regulations in accordance with the Cooperative Enforcement Agreement Between The Government of the United States and the State of Alaska, Pursuant to the Fishery Conservation and Management Act of 1976. See Appendix H.

Congressional intent to preempt State authority can be explicit or implicit and may be evidenced in several ways:

> The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . . or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of State laws on the same subject. . . . Likewise, the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose.

Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (Citations omitted), cited with approval in *Ray v. Atlantic Richfield Company*, 435 U.S. 151, 157-58 (1978).

The Court of Appeals for the State of Alaska incorrectly concluded that in order for federal regulations to preempt state regulations, a direct conflict must exist between the two regulatory schemes. Under preemption analysis, it is irrelevant whether state law conflicts with federal law. Thus in *Campbell v. Hussey*, 368 U.S. 297 (1961), the Supreme Court upheld an injunction against enforcement of a concededly complimentary state tobacco law finding that the Federal Tobacco Inspection Act preempted all state laws classifying and inspecting tobacco:

> We do not have here the question whether Georgia's law conflicts with the federal law. Rather, we have the question of preemption. . . . We then have a case where federal law excludes local regulation even though the latter does no more than supplement the former. . . . [C]omplimentary state regulation is as fatal as state regulations which conflict with the federal scheme.

368 U.S. at 300 and 302.

In this case, the preemption of the state's authority arises from Congress's enactment of the FCMA and the federal government's promulgation of regulations which thoroughly and completely occupy the field of tanner crab management

within the FCZ. All state tanner crab regulations in the FCZ are thereby invalid and may no longer be enforced, even if they happen to be identical to existing federal regulations.

> When Congress has taken the particular subject matter in hand, coincidence is as ineffective as opposition . . .

Pennsylvania v. Nelson, 350 U.S. 497, 504 (1955).

Once the federal government has exercised its authority to manage a particular fishery, there is no reason or excuse for competing state regulations in the FCZ. The state's admitted interest in fishery conservation no longer justifies state regulation after a federal plan has been implemented.

> . . . [W]hen federal administration has made comprehensive regulations effectively governing the subject matter of the statute, the court has said that a state regulation in the field of the statute is invalid . . .

Bethlehem Steel Co. v. N. Y. Labor Rel. Bd., 330 U.S. 767, 774 (1946).

In addition, the goal of uniformity would be frustrated if state regulatory schemes were to be upheld in fisheries where the federal government had enacted a comprehensive management scheme. To allow such state regulation to continue would be to undermine the "national program" envisioned under the FCMA. The Supreme Court has disapproved such situations and the resultant "mischievous conflict" which concurrent jurisdiction engenders.

> If the two Boards attempt to exercise a concurrent jurisdiction to decide . . . action by one necessarily denies the discretion of the other. The second to act either must follow the first, which would make its action useless and vain, or depart from it, which would produce a mischievous conflict.

Bethlehem Steel Co. v. N. Y. Labor Rel. Bd., 330 U.S. at 776.

The present case amply demonstrates the "mischievous conflict" which would arise as a result of concurrent jurisdiction between state and federal authorities once the federal government has implemented a management plan for the fishery. If Alaska is allowed to ignore the federal management scheme and proceeds to enforce its regulations in the FCZ,[2] other states will do likewise. While the FCZ surrounding Alaska is removed from other states, this is not the situation on the east coast. If the states on the eastern seaboard are allowed to regulate fishing within the FCZ, confusion bordering on anarchy will be the likely result as their respective management areas will overlap those of neighboring states. The FCMA was enacted to avoid this result and Alaska, as a member of the Union, must give way and conduct its business as do the other states.

The conclusion that the presence of federal tanner crab regulations preempts the state's authority to regulate the fishery in the FCZ is supported further by reviewing the legislative history[3] of the FCMA and the exception in 16 U.S.C. §1856(a)[4] upon which the state hangs its jurisdictional hat.[5]

---

[2] It is interesting to note that the state's claimed extraterritorial jurisdiction turns solely upon whether or not a particular vessel is registered in Alaska. *State v. F/V Baranof*, 677 P.2d 1245, 1250 and 1251 (Alaska 1984). Arguably, realistic regulation of the tanner crab fishing industry by the state is no longer feasible or possible because the state, by its own admission, can only regulate vessels registered under the laws of the state, AS 16.05.475, and can take no action against an out-of-state vessel which did not register in Alaska and fished exclusively in the FCZ.

[3] The legislative history of the FMCA is collected and reprinted in Senate Committee on Commerce and National Ocean Policy Study, 94th Cong. 2d Sess., *A Legislative History of the Fishing Conservation Act of 1976* (hereinafter Legislative History).

[4] 16 U.S.C. §1856(a) provides in relevant part:

> No state may directly or indirectly regulate any fishery which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such state.

[5] The Alaska Supreme Court states as follows:

> Congress, in passing the FCMA, narrows state authority somewhat by providing that federal management was exclusive outside the three mile limit with one exception . . . 16 U.S.C. §1856(a) . . . Preserved to the states is the authority to regulate state registered vessels in the FCZ.

Baranof, 677 P.2d at 1250.

Senator Warren Magnuson of Washington, principal author of the bill, indicated during debate that federal authority was preeminent outside state waters:

> We say that the states should be exactly as they are in regard to the three-mile limit. The bill then takes away any doubt as to state and federal jurisdiction beyond the three-mile limit and sets up these councils and boards which will take care of disputes. . . . but this removes any doubt about situations beyond three miles.

Legislative History at 462-63. Senator Stevens of Alaska repeatedly stated that the regulatory regime under the Act would govern in the FCZ to the exclusion of state authority.

> The areas between the 3-mile State limit and the 200-mile limit would be within the jurisdiciton of the management council.

Legislative History at 459.

> The State's jurisdiction ends at 3 miles.

Legislative History at 459.

> This bill will settle that because the jurisdiction beyond the 3 miles, if this bill passes, is in fact conferred on the Fishery Management Councils, which, in the state of Alaska, would consist of nine members, five of whom would be Alaskans.

Legislative History at 460.

> It does not change anything with respect to State jurisdiction within the 3-mile zone; it creates a new management entity within the 197-mile area, which is in fact oriented toward local government and not the federal government in the first instance, because Fisheries Management Council members are nominated by the Governor. . . . they represent a regional concept rather than a State or Federal concept.

Legislative History at 460. That the federal government, through the regional councils, was to have exclusive control in the FCZ was abundantly clear to Senator Gravell of Alaska.

who raised repeated objections to this allocation of state and federal jurisdiction. Senator Gravell stated that he wished to see the entire 200 miles "under the management of the State government." *Legislative History* at 463. However, Congress did not adopt Senator Gravell's approach.

The legislative history shows that the language of 16 U.S.C. §1856(a) concerning state jurisdiction was the result of the joint House-Senate conference committee on H.R. 200, the bill that became P.L. 94-265, the FCMA. The report of the conference committee sheds no light on the meaning or purpose of the phraseology employed. It merely states:

> The conference substitute follows the House bill in providing for a limited exception to the principle (contained in both the House bill and the Senate amendment) that nothing in this legislation shall extend or diminish the jurisdiction of any State. The conference substitute also specifies that no State may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State.

Legislative History at 77.

This unenlightening reference does not end our inquiry, however, for the Senate and House bills which went into the conference committee were virtually identical in treating the subject of fishery management authority and state jurisdiction within the FCZ.

Section 1856(a) of the Act is derived from Section 104 of H.R. 200, as passed by the House on October 9, 1975, and section 205 of the Senate amendment (S.961), as passed on January 28, 1976. The House version, entitled "State Jurisdiction", reads:

> Nothing in this Act shall be construed —
>
> (1) as extending the jurisdiction of any state to any natural resource beneath and in the waters within the [fishery conservation] zone;
>
> (2) as diminishing the jurisdiction of any State over any natural resource beneath and in its internal waters; or
>
> (3) except as may be provided pursuant to section 309, as diminishing the jurisdiction of any State to any natural resource beneath and in the waters of the territorial sea of the United States.

Legislative History at 135.

The Senate version, entitled "Relationship to State Laws," provides:

> Nothing in this Act shall be construed to extend the jurisdiction of any State over any natural resources beneath and in the waters beyond its seaward boundaries, or to diminish the jurisdiction of any State over any natural resource beneath and in the waters within its boundaries.

Legislative History at 135.

Nothing in either of these two provisions can possibly be construed or interpreted as reflecting an intention on the part of either the House or the Senate that the states should or could play a concurrent role in the management of fisheries or any other natural resources found within the FCZ after federal regulations regarding a particular species have been adopted.

The significance of this fact to a proper and principled construction of the last phrase of §1856(a), as it emerged from the conference committee, is that both the Senate and House have rules which, quite understandably, preclude conferees from substantially altering legislative provisions with respect to which both Houses are in agreement.[6] Thus, whatever meaning is ascribed to the final phrase of 16 U.S.C. §1856(a), it cannot be construed as an invitation to the states to play any role whatsoever in the management of FCZ fishery resources, after the promulgation of federal regulations, for to do so would mean that both the Senate conferees and their House counterparts violated the rules under which they were appointed and altered the basic substance of a provision with respect to which there was no dispute or disagreement. Furthermore, in the course of passing the bills which went to conference committee and eventually became P.L. 94-265, both Houses of Congress had considered and rejected (or simply failed to act upon) suggestions that the states should regulate fishing within the FCZ concurrently with the Federal Government.

A thorough and objective review of the legislative history of the FCMA establishes at least three facts: (1) Both the House and Senate considered and rejected the concept of concurrent federal/state fishery management authority

---

[6] See, *Deshler's Procedure in the U.S. House of Representatives*, Rule 16.1: "When a bill is sent to conference, matters in disagreement between the Houses, and only matters in disagreement between the Houses, are before the conferees . . . The controlling rule provides that the report of the managers must not include matters not committed to the conference by either House, nor may their report include a modification of any specific topic, question, issue or proposition committed to the conference committee by either or both Houses if that modification is beyond the scope thereof." and *Standing Rules of the Senate*, Rule XXVIII, §2: "(c)onferees shall not insert in their report matter not committed to them by either House, nor shall they strike from the bill matter agreed to by both Houses. If new matter is inserted in the report, or if matter which was agreed to by both Houses is striken from the bill, a point of order may be made against the report, and if the point of order is sustained, the report is rejected or shall be recommitted to the committee of conference if the House of Representatives has not already acted thereon."

within the FCZ; (2) The two bills which were submitted to the Senate/House conference committee on the FCMA were in agreement with one another that State jurisdiction was not to be extended to fish or any other natural resources within the FCZ; and (3) Both the House and Senate have rules which preclude conferees from altering the substance of legislative provisions with respect to which both Houses agree. Under these circumstances, then, it cannot be contended seriously that the last sentence of §1856(a) nullifies §1812, and invites the states to share with the federal government fishery management authority within the FCZ after federal regulations have been adopted.

That Congress did not intend the last sentence of §1856(a) to be construed as an invitation to concurrent state regulation of FCZ fisheries is confirmed further by the Magnuson Fishery Conservation and Management Act Amendments of 1983, P.L. 97-453, and 1984, P.L. 98-623. The 1983 amendment changed §1856(a) by adding the following:

> For purposes of this Act, except as provided in subsection (b), the jurisdiction and authority of a State shall extend (1) to any pocket of waters that is adjacent to the State and totally enclosed by lines delimiting the territorial seas of the United States pursuant to the Geneva Convention on the Territorial Sea and Contiguous Zone or any successor convention to which the United States is a party and (2) with respect to the body of water commonly known as Nantucket Sound, to the pocket of water west of the seventieth meridian west of Greenwich.

The purpose of the first clause of this new provision is explained at page 10 of Senate Report 97-519, 97th Cong., 2d Sess. (1982) as follows:

> This amendment to the act addresses a problem between State and Federal management jurisdiction in geographic areas having very irregular, jagged coast lines (such as Alaska). There exist in these areas pockets of Federal waters which are surrounded by State waters. This obviously creates an unmanagable jurisdictional conflict. The Committee's suggested solution to this conflict is to treat such pockets of Federal waters as being under the jurisdiction and authority of the State involved.

To similar effect is H.R. Rep. 97-549, 97th Cong., 2d Sess. 3031 (1982), the House Committee on Merchant Marine and Fisheries Report which accompanied H.R. 5002:

> Section 10 of the bill incorporates two changes to the existing section 306 of the Act. The first such change would address those limited situations where federal waters are enclosed by state waters. This situation most often occurs in areas of the coastline where a peninsula or offshore islands, the territory of a particular state, are more than six miles from the mainland. The amendment would grant jurisdiction and authority to the states over such federal waters, but solely for the purposes of conserving and managing fishery resources as set forth in the Act.

The purpose of the second clause was to give the State of Massachusetts fishery management authority over all waters within Nantucket Sound, even though they are not quite enclosed by state waters and thus do not fall within the situation addressed by clause (1). As explained by Congressman Studds:

> Section 9 of the amendment addresses those limited situations where Federal waters are surrounded by State waters. The presence of these pockets creates incongruous fishery management schemes and presents significant problems in the area of fisheries law enforcement. Nantucket Sound is identical to these areas and creates the same fishery management problems, although not totally enclosed by the territorial sea. At the eastern edge of the sound the lines delimiting the territorial sea come within 1 mile of intersecting each other.
>
> I am pleased that the amendment now before us includes language which I requested to resolve this problem. Quite simply, it treats Nantucket Sound as the other

> affected areas. Historically, the Massachusetts Division of Marine Fisheries provided the management of the fisheries in the sound, fisheries law enforcement, conducted stock assessments and other fishery related research, and continues to do so today. By insuring a unified fisheries management regime, this amendment will enhance fishery conservation and fisheries law enforcement in the sound.

Cong. Rec. H. 9971 (daily ed., Dec. 16, 1982).

The 1984 amendment designated numbers for the previously unenumerated provisions of §1856(a) and added another extension to state jurisdiction as follows:

> (2) For the purposes of this chapter, except as provided in subsection (b) of this section, the jurisdiction and authority of a State shall extend —
>
> . . .
>
> (C) to the waters of southeastern Alaska (for the purpose of regulating fishing for other than any species of crab) that are —
>
> (i) north of the line representing the international boundary at Dixon Entrance and the westward extension of that line; east of 138 degrees west longitude; and not more than three nautical miles seaward from the coast, from the lines extending from headland to headland across all bays, inlets, straits, passes, sounds, and entrances, and from any island or group of islands, including the islands of the Alexander Archipelago (except Forrester Island); or
>
> (ii) between the islands referred to in clause (i) (except Forrester Island) and the mainland.

The implication of the 1983 and 1984 amendments to the FCMA is quite clear: prior to their passage, and notwithstanding the last sentence of §1856(a), neither Alaska nor any other state had jurisdiction to manage fisheries in waters beyond its territorial sea once federal regulations have been adopted. Thanks to the 1983 and 1984 amendments, Alaska now has that authority with respect to federal waters described in the amendments. However, this does not describe the Gulf of Alaska, where the alleged illegality associated with the case at bar took place. Furthermore, the 1984 amendment specifically excludes all species of crab from state regulation.

If Alaska wishes the authority to manage, jointly with the United States Government, the tanner crab fisheries which are more than three miles from its shores, it must seek an amendment to §1856(a) of the FCMA. Until it does so, and until such an amendment is enacted into law, Alaska simply may not exercise any fishery management authority over tanner crab within the FCZ (other than in areas completely surrounded by Alaskan waters).

The entire regional Fishery Management Council scheme evidences a Congressional intent that a federally administrated, regional decision-making process would determine appropriate conservation and management measures. In accordance with that scheme, the North Pacific Fishery Management Council has adopted a FMP comprehensively regulating the tanner crab fishery in the FCZ off Alaska. The effect of which has been recognized by the Supreme Court of Rhode Island:

> By enacting (the Magnuson Act), Congress has preempted state regulation of commercial fishing in the area between the states' boundaries and 200 miles seaward when federal regulations governing such fishing have been promulated.

State v. Sterling, 448 A.2d 785, 787 (R.I. 1982). To allow Alaska to hold otherwise would be to undermine the "national program" envisioned under the Act. Once an FMP has been implemented for a fishery, the state has no authority to regulate that fishery in the FCZ, and any state regulation is null and void under the doctrine of federal preemption.

CONCLUSION

The Court should take jurisdiction of this case because whether the State of Alaska may continue to regulate tanner crab fishing in the FCZ after the adoption of a FMP and the promulgation of federal tanner crab regulations presents a critical question regarding the respective roles of state and federal regulatory authorities under the FCMA, the resolution of which is long overdue.

DATED this 28th day of August, 1985.

Respectfully submitted,

C. Walter Ebell*
JAMIN, EBELL, BOLGER & GENTRY
P.O. Box 4269
Kodiak, AK 99615
(907) 486-6024

* *Counsel of Record* *Counsel for Appellant*

APPENDIX A

No. A-452

IN THE COURT OF APPEALS OF ALASKA

STATE OF ALASKA,

Appellant,

v.

THEODORE PAINTER, JR.,

Appellee.

SINGLETON, Judge

OPINION

Theodore Painter, Jr., was charged with unlawful fishing for tanner crab in violation of state regulations. 5 AAC 35.510(1). Both the state and Painter agreed that the fishing occurred in the Fishery Conservation Zone (FCZ), that is, between three and two hundred miles from shore. Painter moved to dismiss. After briefing and oral agrument, the motion was granted on the ground that the state had no

jurisdiction. The state appeals. We reverse and remand.

In his motion to dismiss, Painter argued that the state tanner crab regulations are invalid because they attempt to regulate the taking of tanner crab beyond the territorial sea (three miles) of the state. Essentially Painter's argument was that, with the enactment of the Magnuson Fishery Conservation and Management Act (FCMA), 16 U.S.C. §§ 1801-82 (1982) (effective March 1, 1977), jurisdiction over fishery management in the seas between three and two hundred miles from shore became exclusively federal.

Magistrate Dennis L. Nelson made several findings of fact before ruling that the state did not have jurisdiction. He found that Painter's vessel, the Alaska Trojan, was registered in the State of Alaska, and that the fishing had occurred in the FCZ. Magistrate Nelson also found

that the federal government had promulgated regulations regarding tanner crab fishing (50 C.F.R. §§ 671.1-.27 (1983)), that Alaska also had regulations regarding tanner crab (5 AAC 35), that the state and federal regulations were "substantially the same," and that a cooperative enforcement agreement between the state and federal authorities was and is in effect.

As a "conclusion of law," Magistrate Nelson held that the state had no jurisdiction and ordered the matter dismissed. The reason for that legal conclusion was his understanding that the FCMA indicated a Congressional intent to provide a national program for fishery management under exclusively federal jurisdiction with any state input to be effected through the state's participation in regional councils. Thus, he concluded that when federal regulations concerning a fishery exist, no state

regulations affecting that fishery will be allowed.

The cases decided under the FCMA do not lead to the result reached below. The FCMA has been found not to have entirely occupied the area of fisheries management in the FCZ. Even since the enactment of the FCMA, when a state has regulated a fishery and that regulation is applied in the FCZ, the courts have not found those state regulations invalid in the absence of some conflict between the state and federal regulations, State v. Sterling, 448 A.2d 785, (R.I.1982), or their policies, e.g., State v. F/V Baranof, 677 P.2d 1245 (Alaska), cert. denied ____ U.S. ____, 105 S.Ct. 98, 83 L.Ed.2d 43 (1984); People v. Weeren, 26 Cal.3d 654, 163 Cal.Rptr. 255, 607 P.2d 1279, cert. denied, 449 U.S. 839, 101 S.Ct. 115, 66 L.Ed.2d 45 (1980).

The Alaska Supreme Court considered the effect of the FCMA on state regulation of fisheries in State v. F/V Baranof, 677 P.2d 1245 (Alaska), cert. denied, ___ U.S. ____, 105 S.Ct. 98, 83 L.Ed.2d 43 (1984). Baranof concerned an in rem forfeiture proceeding against a fishing vessel alleged to have exceeded the authorized catch limit for king crab. Just as here, the regulation which had been violated was a state regulation and the fishing had occurred outside of the state's territorial seas. The court upheld the validity of the state king crab regulations and their application to vessels outside of the state's territorial seas. The F/V Baranof was registered in Alaska under the laws of Alaska.

The Baranof facts are distinguishable from Painter's situation in only one meaningful regard. At the time of Baranof, no federal king crab regulations had been

promulgated. The opinion notes this point before concluding that the FCMA carried no implicit preemption. The court recognized that to find preemption in the absence of federal regulations would defeat the purpose of the FCMA in that it would leave the FCZ entirely unregulated and thereby endanger the fishery which the enactment of the FCMA was intended to better protect, not to leave more vulnerable to depletion. 677 P.2d at 1251.

In the instant case, federal tanner crab regulations do exist. See 50 CFR §§ 671.1-.27 (1983). However, the trial court found the state and federal regulations to be "substantially the same." Painter pointed out that the state scheme provided criminal sanctions for violations while the federal scheme for the most part provided only civil sanctions, and he argued that the civil/criminal difference constitutes conflict and, therefore, is grounds for

finding federal preemption. Painter provided no support in case law for that proposition. In any event, the trial court apparently found preemption on the basis of the existence at all (even though consistent) of federal regulations. It is that holding which we reverse.

F/V American Eagle v. State, 620 P.2d 657 (Alaska 1980), appeal dismissed, 454 U.S. 1130, 102 S.Ct. 985, 71 L.Ed.2d 284 (1982), is an earlier Alaska Supreme Court decision which upheld an in rem civil forfeiture of a vessel for violations of Alaska fishing regulations. The decision is cited approvingly in the Baronof case. The American Eagle court states:

> To the extent that there may be a conflict between state fisheries regulations and federal regulations promulgated under the Act [FCMA], Alaska's authority to regulate fisheries under Bundrant has been superseded.

620 P.2d at 622 n. 10. Bundrant was a pre-FCMA case which rejected the argument that the federal government had exclusive jurisdiction to regulate fishing outside of three miles from shore. Bundrant v. State, 546 P.2d 530 (Alaska), appeal dismissed sub nom. Uri v. State, 429 U.S. 806, 97 S.Ct. 40, 50 L.Ed.2d 66 (1976). The American Eagle case arose before the effective date of the FCMA, but the language quoted is the Alaska Supreme Court's interpretation of the effect of the FCMA. That interpretation is reaffirmed in Baranof.

In this case, the trial court did not find preemption by conflict. the trial court did not find "conflict;" in fact it found the state and federal regulations to be "substantially the same." Preemption is not triggered by the mere promulgation of federal regulations pertaining to the same fishery. See Baranof.

Painter advanced other grounds in support of his motion to dismiss. By reversing the trial court's finding of preemption, we do not decide the merits of Painter's other arguments. Those grounds are not before us in the decision appealed. Therefore we do not address them at this time.

The case is REMANDED to the trial court for further proceedings consistent with this opinion.

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF ALASKA
Supreme Court No. S-885
[filed and entered May 31, 1985]

THEODORE PAINTER, JR.,

Petitioner,

v.

STATE OF ALASKA,

Respondent.

Court of Appeals No. A-452
District Court No. 3KO 84-31 Cr.

ORDER

Before: Rabinowitz, Chief Justice, Burke, Matthews, Compton and Moore, Justices.

On consideration of the petition for hearing, filed on March 11, 1985, and the response to the petition, filed on April 26, 1985,

IT IS ORDERED:

The petition for hearing is denied.

Entered by direction of the court at Anchorage, Alaska on May 28, 1985.

CLERK OF THE SUPREME COURT

s/ David A. Lampen
DAVID A. LAMPEN

ccs: Justices
Counsel
Court of Appeals Judges
The Honorable Dennis L. Nelson, Magistrate
Appeals Deputy Clerk, Anchorage Trial Courts

APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF ALASKA

Supreme Court No. S-885

THEODORE PAINTER, JR.,

Petitioner,

v.

STATE OF ALASKA,

Respondent.

Court of Appeals No. A-452
District Court No. 3KO-84-31 Cr.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Petitioner, THEODORE PAINTER, JR., hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of the State of Alaska denying the Petition for Hearing, entered on May 31, 1985.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated this 5th day of June, 1985.

JAMIN, EBELL, BOLGER & GENTRY
Attorneys for Petitioner

By: s/C. Walter Ebell
C. Walter Ebell

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on the Appellee by causing to be mailed a copy thereof to its attorney of record: State of Alaska, Department of Law, Assistant Attorney General, Sarah Elizabeth McCracken, 1031 W. Fourth Avenue, Suite 200, Anchorage, AK 99501, this 5th day of June, 1985.

s/C. Walter Ebell
C. Walter Ebell

APPENDIX D

UNITED STATES CONSTITUTIONAL PROVISIONS

Article VI, Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and anything in the Constitution or Laws of any state to the Contrary notwithstanding.

APPENDIX E

Magnuson Fishery Conservation and Management Act of 1976

16 U.S.C. § 1801: Findings, purposes and policy.

(a) Findings. -- The Congress finds and declares the following:

(1) The fish off the coasts of the United States, the highly migratory species of the high seas, the species which dwell on or in the Continental Shelf appertaining to the United States, and the anadromous species which spawn in the United States rivers or estuaries, constitute valuable and renewable natural resources. These fishery resources contribute to the food supply, economy, and health of the Nation and provide recreational opportunities.

(2) As a consequence of increased fishing pressure and because of the inadequacy of fishery conservation and management practices and controls (A) certain stocks of such fish have been overfished to the point where their survival is threatened, and (B) other such stocks have been so substantially reduced in number that they could become similarly threatened.

(3) Commercial and recreational fishing constitutes a major source of employment and contributes significantly to the economy of the Nation. Many coastal areas are dependent upon fishing and related activities, and their economies have been badly damaged by the overfishing of fishery resources at an ever-increasing rate over the past decade. The activities of massive

foreign fishing fleets in waters adjacent to such coastal areas have contributed to such damage, interfered with domestic fishing efforts, and caused destruction of the fishing gear of United States fishermen.

(4) International fishery agreements have not been effective in preventing or terminating the overfishing of these valuable fishery resources. There is danger that irreversible effects from overfishing will take place before an effective international agreement on fishery management jurisdiction can be negotiated, signed, ratified, and implemented.

(5) Fishery resources are finite but renewable. If placed under sound management before overfishing has caused irreversible

effects, the fisheries can be conserved and maintained so as to provide optimum yields on a continuing basis.

(6) A national program for the conservation and management of the fishery resources of the United States is necessary to prevent overfishing, to rebuild overfished stocks, to insure conservation, and to realize the full potential of the Nation's fishery resources.

(7) A national program for the development of fisheries which are underutilized or not utilized by the United States fishing industry, including bottom fish off Alaska, is necessary to assure that our citizens benefit from the employment, food supply, and revenue which could be generated thereby.

(b) Purposes. -- It is therefore declared to be the purposes of the Congress in this chapter -

(1) to take immediate action to conserve and manage the fishery resources found off the coasts of the United States, and the anadromous species and Continental Shelf Fishery resources of the United States, by establishing (A) a fishery conservation zone within which the United States will assume exclusive fishery management authority over all fish, except highly migratory species, and (B) exclusive fishery management authority beyond such zone over such anadromous species and Continental Shelf fishery resources;

(2) to support and encourage the implementation and enforcement of internationl fishery agreements

for the conservation and management of highly migratory species, and to encourage the negotiation and implementation of additional such agreements as necessary;

(3) to promote domestic commercial and recreational fishing under sound conservation and management principles;

(4) to provide for the preparation and implementation, in accordance with national standards, of fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery;

(5) to establish Regional Fishery Management Councils to prepare, monitor, and revise such plans under circumstances (A) which will enable the States, the fishing industry, consumer and environmental

organizations, and other interested persons to participate in, and advise on, the establishment and administration of such plans, and (B) which take into account the social and economic needs of the States; and

(6) to encourage the development by the United States fishing industry of fisheries which are currently underutilized or not utilized by United States fishermen, including bottom fish off Alaska, and to that end, to ensure that optimum yield determinations promote such development.

(c) Policy. -- It is further declared to be the policy of the Congress in this chapter --

(1) to maintain without change the existing territorial or other ocean jurisdiction of the United

States for all purposes other than the conservation and management of fishery resources, as provided for in this chapter;

(2) to authorize no impediment to, or interference with, recognized legitimate uses of the high seas, except as necessary for the conservation and management of fishery resources, as provided for in this chapter;

(3) to assure that the national fishery conservation and management program utilizes, and is based upon, the best scientific information available; involves, and is responsive to the needs of, interested and affected States and citizens; promotes efficiency; draws upon Federal, State, and academic capabilities in carrying out research,

administration, management, and enforcement; and is workable and effective;

(4) to permit foreign fishing consistent with the provisions of this chapter; and

(5) to support and encourage continued active United States efforts to obtain an internationally acceptable treaty, as the Third United Nations Conference on the Law of the Sea, which provides for effective conservation and management of fishery resources.

Pub.L. 94-265 § 2, Apr. 13, 1976, 90 Stat. 331, amended Pub.L. 95-354, § 2, Aug. 28, 1978, 92 Stat. 519; Pub.L. 95-561, Title II, § 233, Dec. 22, 1980, 94 Stat. 3299.

16 U.S.C. § 1811. Fishery conservation zone.

There is established a zone contiguous to the territorial sea of the United States to be known as the fishery conservation zone. The inner boundary of the fishery conservation zone is a line conterminous with the seaward boundary of each of the coastal States, and the outer boundary of such zone is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured.

Pub.L 94-265, Title I, § 101, Apr. 13, 1976, 90 Stat. 336.

16 U.S.C. § 1812. Exclusive fishery management authority.

The United States shall exercise exclusive fishery management authority, in the manner provided for in this chapter, over the following:

(1) All fish within the fishery conservation zone.

(2) All anadromous species throughout the migratory range of each such species beyond the fishery conservation zone; except that such management authority shall not extend to such species during the time they are found within any foreign nation's territorial sea or fishery conservation zone (or the equivalent), to the extent that such sea or zone is recognized by the United States.

(3) All Continental Shelf fishery resources beyond the fishery conservation zone.

Pub.L. 94-265, Title I, § 102, Apr. 13, 1976, 90 Stat. 336.

16 U.S.C. § 1851: National standards for fishery conservation and management.

(a) In general. -- Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant

to this subchapter shall be consistent with the following national standards for fishery conservation and management.

(1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery.

(2) Conservation and management measures shall be based upon the best scientific information available.

(3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

(4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to

allocate or assign fishing privileges amoung various United States fishermen, such allocation shall be (A) fair and equitable to all such fisherman; (B) reasonably calculated to promote conservation; (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

(5) Conservation and management measures shall, where practicable, promote efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.

(6) Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.

(7) Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.

(b) Guidelines. -- The Secretary shall establish guidelines, based on the national standards, to assist in the development of fishery management plans.

Pub.L. 94-256, Title III § 301, Apr. 13, 1976, 90 Stat. 346 (amended 1983).

16 U.S.C. § 1852: Regional fishery management councils.

(a) Establishment. -- There shall be established, within 120 days after April 13, 1976, eight Regional Fishery Management Councils, as follows:

(1) New England Council. -- The New England Fishery Management Council shall consist of the States of Maine, New Hampshire, Massachusetts, Rhode Island, and Connecticut and shall have authority

over the fisheries in the Atlantic Ocean seaward of such States. The New England Council shall have 17 voting members, including 11 appointed by the Secretary pursuant to subsection (b)(1)(C) of this section (at least one of whom shall be appointed from each such State).

(2) Mid-Atlantic Council. -- The Mid-Atlantic Fishery Management Council shall consist of the States of New York, New Jersey, Delaware, Pennsylvania, Maryland, and Virginia and shall have authority over the fisheries in the Atlantic Ocean seaward of such States. The Mid-Atlantic Council shall have 19 voting members, including 12 appointed by the Secretary pursuant to subsection (b)(1)(C) of this section (at least one of whom shall be appointed from each such State).

(3) South Atlantic Council. -- The South Atlantic Fishery Management Council shall consist of the States of North Carolina, South Carolina, Georgia, and Florida and shall have authority over the fisheries in the Atlantic Ocean seaward of such States. The South Atlantic Council shall have 13 voting members, including 8 appointed by the Secretary pursuant to subsection (b)(1)(C) of this section (at least one of whom shall be appointed from each such State).

(4) Caribbean Council -- The Caribbean Fishery Management Council shall consist of the Virgin Islands and the Commonwealth of Puerto Rico and shall have authority over the fisheries in the Caribbean Sea and Atlantic Ocean seaward of such

States. The Carribbean [sic] Council shall have 7 voting members including 4 appointed by the Secretary pursuant to subsection (b)(1)(C) of this section (at least one of whom shall be appointed from each such State).

(5) Gulf Council. -- The Gulf of Mexico Fishery Management shall consist of the States of Texas, Louisiana, Mississippi, Alabama, and Florida and shall have authority over the fisheries in the Gulf of Mexico seaward of such States. The Gulf Council shall have 17 voting members, including 11 appointed by the Secretary pursuant to subsection (b)(1)(C) of this section (at least one of whom shall be appointed from each such State).

(6) Pacific Council. -- The Pacific Fishery Management Council

shall consist of the States of California, Oregon, Washington, and Idaho and shall have authority over the fisheries in the Pacific Ocean seaward of such States. The Pacific Council shall have 13 voting members, including 8 appointed by the Secretary pursuant to subsection (b)(1)(C) of this section (at least one of whom shall be appointed from each such State).

(7) North Pacific Council. -- The North Pacific Fishery Management Council shall consist of the States of Alaska, Washington, and Oregon and shall have authority over the fisheries in the Arctic Ocean, Bering Sea, and Pacific Ocean seaward of Alaska. The North Pacific Council shall have 11 voting members, including 7 appointed by

the Secretary pursuant to subsection (b)(1)(C) of this section (5 of whom shall be appointed from the State of Alaska and 2 of whom shall be appointed from the State of Washington).

(8) Western Pacific Council. -- The Western Pacific Fishery Management Council shall consist of the State of Hawaii, American Samoa, and Guam and shall have authority over the fisheries in the Pacific Ocean seaward of such States. The Western Pacific Council shall have 11 voting members, including 7 appointed by the Secretary pursuant to subsection (b)(1)(C) of this section (at least one of whom shall be appointed from each such State).

Each Council shall reflect the expertise and interest of the several constituent

States in the ocean area over which such Council is granted authority.

(b) Voting members. -- (1) The voting members of each Council shall be:

(A) The principle State official with marine fishery management responsibility and expertise in each constitutent State, who is designated as such by the Governor of the State, so long as the official continues to hold such position, or the designee of such official.

(B) The regional director of the National Marine Fisheries Service for the geographic area concerned, or his designee, except that if two such directors are within such geographical area, the Secretary shall designate which of such directors shall be the voting member.

(C) The members required to be appointed by the Secretary shall be appointed by the Secretary from a list of qualified individuals submitted by the Governor of each applicable constitutent State. With respect to the initial such appointments, such Governors shall submit such lists to the Secretary as soon as practicable, not later than 45 days after April 13, 1976. As used in this subparagraph, (i) the term "list of qualified individuals" shall include the names (including pertinent biolgraphical [sic] data) of not less than three such individuals for each applicable vacancy and (ii) the term "qualified individual" means an individual who is knowledgeable or experienced with regard to the management, conservation, or recreational or commercial

harvest, of the fishery resources of the geographical area concerned.

(2) Each voting member appointed to a Council pursuant to paragraph (1)(C) shall serve for a term of 3 years; except that, with respect to the members initially so appointed, the Secretary shall designate up to one-third thereof to serve for a term of 1 year, up to one-third thereof to serve for a period of 2 years, and the remaining such members to serve for a term of 3 years.

(3) Successors to the voting members of any Council shall be appointed in the same manner as the original voting members. Any individual appointed to fill a vacancy occurring prior to the expiration of any term of office

shall be appointed for the remainder of that term.

(c) Nonvoting members. -- (1) the nonvoting members of each Council shall be:

(A) The regional or area director of the United States Fish and Wildlife Service for the geographical area concerned, or his designee.

(B) The commander of the Coast Guard district for the geographical area concerned, or his designee; except that, if two Coast Guard districts are within such geographical area, the commander designated for such purpose by the commandant of the Coast Guard.

(C) The executive director of the Marine Fisheries Commission for the geographical area concerned, if any, or his designee.

(D) One representative of the Department of State designated for such purpose by the Secretary of State, or his designee.

(2) The Pacific Council shall have one additional nonvoting member who shall be appointed by, and serve at the pleasure of, the Governor of Alaska.

(d) Compensation and expenses. -- The voting members of each Council, who are not employed by the Federal Government or any State or local government, shall receive compensation at the daily rate for GS-18 of the General Schedule when engaged in the actual performance of duties for such Council. The voting members of each Council, any nonvoting member described in subsection (c)(1)(C) of this section, and the nonvoting member appointed pursuant to

subsection (c)(1)(C) of this section, and the nonvoting member appointed pursuant to subsection (c)(2) of this section shall be reimbursed for actual expenses incurred in the performance of such duties, and other nonvoting members may be reimbursed for actual expenses.

(e) Transaction of business. --

(1) A majority of the voting members of any Council shall constitute a quorum, but one or more such members designated by the Council may hold hearings. All decisions of any Council shall be by majority vote of the voting members present and voting.

(2) The voting members of each Council shall select a Chairman for such Council from among the voting members.

(3) Each Council shall meet in the geographical area concerned at the

call of the Chairman or upon the request of a majority of its voting members.

(4) If any voting member of a Council disagrees with respect to any matter which is transmitted to the Secretary by such Council, such member may submit a statement to the Secretary setting forth the reasons for such disagreement.

(f) Staff and administration. --

(1) Each Council may appoint, and assign duties to, an executive director and such other full- and part-time administrative employees as the Secretary determines are necessary to the performance of its functions.

(2) Upon the request of any Council, and after consultation with the Secretary, the head of any Federal agency is authorized to detail to such

Council, on a reimbursable basis, any of the personnel of such agency, to assist such Council in the performance of its functions under this chapter.

(3) The Secretary shall provide to each Council such administrative and technical support services as are necessary for the effective functioning of such Council.

(4) The Administrator of General Services shall furnish each Council with such offices, equipment, supplies, and services as he is authorized to furnish to any other agency or instrumentality of the United States.

(5) The Secretary and the Secretary of State shall furnish each Council with relevant information concerning foreign fishing and international fishery agreements.

(6) Each Council shall determine its organization and prescribe its practices and procedures for carrying out its functions under this chapter, in accordance with such uniform standards as are prescribed by the Secretary. Each Council shall publish and make available to the public a statement of its organization, practices, and procedures.

(7) The Secretary shall pay --

(A) the compensation and expenses provided for in subsection (d) of this section;

(B) appropriate compensation to employees appointed under paragraph (1);

(C) the amounts required for reimbursement of other Federal agencies under paragraphs (2) and (4);

(D) the actual expenses of the members of the committees and panels established under subsection (g) of this section; and

(E) such other costs as the Secretary determines are necessary to the performance of the functions of the Councils.

(g) Committees and panels. --

(1) Each Council shall establish and maintain, and appoint the members of, a scientific and statistical committee to assist it in the development, collection, and evaluation of such statistical, biological, economic, social, and other scientific information as is relevant to such Council's development and amendment of any fishery management plan.

(2) Each Council shall establish such other advisory panels as are necessary or appropriate to assist it

in carrying out its functions under this chapter.

(h) Functions. -- Each Council shall, in addordance [sic] with the provisions of this chapter --

(1) prepare and submit to the Secretary a fishery management plan with respect to each fishery within its geographical area of authority and, from time to time, such amendments to each such plan as are necessary;

(2) prepare comments on any application for foreign fishing transmitted to it under section 1824 (b)(4)(B) of this title, and any fishery management plan or amendment transmitted to it under section 1854 (c)(2) of this title;

(3) conduct public hearings, at appropriate times and in appropriate locations in the goegraphical [sic] area concerned, so as to allow all interested persons an opportunity to be heard in the development of fishery management plans and amendments to such plans, and with respect to the administration and implementation of the provisions of this chapter;

(4) submit to the Secretary --

(A) a report, before February 1 of each year, on the Council's activities during the immediately preceding calendar year,

(B) such periodic reports as the Council deems appropriate, and

(C) any other relevant report which may be requested by the Secretary;

(5) review on a continuing basis, and revise as appropriate, the assessments and specifications made pursuant to section 1853(a)(3) and (4) of this title with respect to the optimum yield from the capacity and extent to which United States fish processors will process United States harvested fish from, and the total allowable level of foreign fishing in, each fishery within its geographical area of authority; and

(6) conduct any other activities which are required by, or provided for in, this chapter or which are necessary and appropriate to the foregoing functions.

Pub.L. 94-265, Title III, § 302, Apr. 13, 1976, 90 Stat. 347, amended Pub.L. 95-354 §

5(1), Aug. 28, 1978, 92 Stat. 521; Pub.L. 95-561, Title II, § 234, Dec. 22, 1980, 94 Stat. 3299 (amended 1983).

16 U.S.C. § 1853. Contents of fishery management plans.

(a) Required provisions. -- Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, shall --

(1) contain the conservation and management measures, applicable to foreign fishing and fishing by vessels of the United States, which are --

(A) necessary and appropriate for the conservation and management of the fishery;

(B) described in this subsection or subsection (b) of this section, or both, and

(C) consistent with the national standards, the other provisions of this chapter, and any other applicable law;

(2) contain a description of the fishery, including, but not limited to the number of vessels involved, the type and quantity of fishing gear used, the species of fish involved and their location, the cost likely to be incurred in management, actual and potential revenues from the fishery, any recreational interests in the fishery, and the nature and extent of foreign fishing and Indian treaty fishing rights, if any;

(3) assess and specify the present and probable future condition of, and the maximum sustainable yield and optimum yield from the fishery, and include a summary of the information utilized in making such specification;

(4) assess and specify --

(A) the capacity and the extent to which fishing vessels of the United States, on an annual basis, will harvest the optimum yield specified under paragraph (3).

(B) the portion of such optimum yield which, on an annual basis, will not be harvested by fishing vessels of the United States and can be made available for foreign fishing, and

(C) the capacity and extent to which United States fish processors, on an annual basis, will process that portion of such optimum yield that will be harvested by fishing vessels of the United States; and

(5) specify the pertinent data which shall be submitted to the Secretary with respect to the

fishery, including, but not limited to, information regarding the type and quantity of fishing gear used, catch by species in numbers of fish or weight thereof, areas in which fishing, number of hauls, and the estimated processing capacity of, and the actual processing capacity utilized by, United States fish processors.

(b) Discretionary provisions. -- Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, may --

(1) require a permit to be obtained from, and fees to be paid to, the Secretary with respect to any fishing vessel of the United States fishing, or wishing to fish, in the fishery conservation zone, or for anadromous species or Continental Shelf fishery resources beyond such zone;

(2) designate zones where, and periods when, fishing shall be limited, or shall not be permitted, or shall be permitted only by specified types of fishing vessels or with specified types and quantities of fishing gear;

(3) establish specified limitations on the catch of fish (based on area, species, size, number, weight, sex, incidental catch, total biomass, or other factors), which are necessary and appropriate for the conservation and management of the fishery;

(4) prohibit, limit, condition, or require the use of specified types and quantities of fishing gear, fishing vessels, or equipment for such vessels, including devices which may be required to facilitate enforcement of the provisions of this chapter;

(5) incorporate (consistent with the national standards, the other provisions of this chapter, and any other applicable law) the relevant fishery conservation and management measures of the coastal States nearest to the fishery;

(6) establish a system for limiting access to the fishery in order to achieve optimum yield if, in developing such systems, the Council and the Secretary take into account --

(A) present participation in the fishery,

(B) historical fishing practices in, and dependence on, the fishery,

(C) the economics of the fishery,

(D) the capability of fishing vessels used in the fishery to engage in other fisheries,

(E) the cultural and social framework relevant to the fishery, and

(F) any other relevant considerations; and

(7) prescribed such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery.

(c) Proposed regulations. -- Any Council may prepare any proposed regulations which it deems necessary and appropriate to carry out any fishery management plan, or any amendment to any fishery management plan which is prepared by it. Such proposed regulations shall be submitted to the Secretary, together with such plan or amendment for action by the Secretary pursuant to sections 1854 and 1855 of this title.

(d) Confidentiality of statistics. -- Any statistics submitted to the Secretary by any person in compliance with any requirement under subsection (a)(5) of this section shall be confidential and shall not be disclosed except when required under court order. The Secretary shall, by regulation, prescribe such procedures as may be necessary to preserve such confidentiality, except that the Secretary may release or make public any such statistics in any aggregate or summary form which does not directly or indirectly disclose the indentity or business of any person who submits such statistics.

Pub.L. 94-265, Title III, § 303, Apr. 13, 1976, 90 Stat. 351, amended Pub.L. 95-354, § 5 (2), (3), Aug. 28, 1978, 92 Stat. 521 (amended 1983)

16 U.S.C. § 1854. Action by the Secretary. (a) Action by the Secretary after receipt of plan. -- Within 60 days after the Secretary receives any fishery management plan, or any amendment to any such plan, which is prepared by any Council, the Secretary shall --

(1) review such plan or amendment pursuant to subsection (b) of this section; and

(2) notify such Council in writing of his approval, disapproval of such plan or amendment.

In the case of disapproval or partial disapproval, the Secretary shall include in such notification a statement and explanation of the Secretary's objections and the reasons therefor, suggestions for improvement, a request to resubmit the plan or amendment, as so modified, to the Secretary within 45 days after the date on which the Council receives such notification.

(b) Review by the Secretary -- The Secretary shall review any fishery management plan, and any amendment to any such plan, prepared by any Council and submitted to him to determine whether it is consistent with the national standards, the other provisions of this chapter, and any other applicable law. In carrying out such review, the Secretary shall consult with --

(1) the Secretary of State with respect to foreign fishing; and

(2) the secretary of the department in which the Coast Guard is operating with respect to enforcement at sea.

(c) Preparation by the Secretary. --

(1) The Secretary may prepare a fishery management plan, with respect to any fishery, or any amendment to any such plan, in accordance with the

national standards, the other provisions of this chapter, and any other applicable law, if --

(A) the appropriate Council fails to develop and submit to the Secretary, after a reasonable period of time, a fishery management plan for such fishery, or any necessary amendment to such a plan, if such fishery requires conservation and management; or

(B) the Secretary disapproves or partially disapproves any such plan or amendment, and the Council involved fails to change such plan or amendment in accordance with the notification made under subsection (a)(2) of this section.

In preparing any such plan or amendment, the Secretary shall consult with the Secretary of State with respect to foreign

fishing and with the Secretary of the department in which the Coast Guard is operating with respect to enforcement at sea.

(2)(A) Whenever, pursuant to paragraph (1), the Secretary prepares a fishery management plan or amendment, the Secretary shall promptly transmit such plan or amendment to the appropriate Council for consideration and comment. Within 45 days after the date of receipt of such plan or amendment, the appropriate Council may recommend, to the Secretary, changes in such plan or amendment, consistent with the national standards, the other provisions of this chapter, and any other applicable law. After the expiration of such 45 day period, the Secretary may implement such plan or amendment pursuant to section 1855 of this title.

(3) Notwithstanding paragraph (1), the Secretary may not include in any fishery management plan, or any amendment to any such plan, prepared by him, a provision establishing a limited access system described in section 1853(b)(6) of this title, unless such system is first approved by a majority of the voting members, present and voting, of each appropriate Council.

(d) Establishment of fees. -- The Secretary shall by regulation establish the level of any fees which are authorized to be charged pursuant to section 1853(b)(1) of this title. Such level shall not exceed the administrative costs incurred by the Secretary in issuing such permits.

(e) Fisheries Research. -- The Secretary shall initiate and maintain a comprehensive program of fishery research to carry out and further the purposes, policy, and

provisions of this chapter. Such program shall be designed to acquire knowledge and information, including statistics, on fishery conservation and management, including, but not limited to, biological research concerning the interdependence of fisheries or stocks of fish, the impact of pollution on fish, the impact of wetland and estuarine degradation, and other matters bearing upon the abundance and availability of fish.

(f) Miscellaneous duties. -- (1) If any fishery extends beyond the geographical area of authority of any one Council, the Secretary may --

(A) designate which Council shall prepare the fishery management plan for such fishery and any amendment to such plan; or

(B) may require that the plan and amendment be prepared jointly by the Councils concerned.

No jointly prepared plan or amendment may be submitted to the Secretary unless it is approved by a majority of the voting members, present and voting, of each Council concerned.

(2) The Secretary shall establish the boundaries between the geographical areas of authority of adjacent Councils.

Pub.L. 94-265, Title III, § 304, Apr. 13, 1976, 90 Stat. 352 (amended 1983).

16 U.S.C. § 1855. Implementation of fishery management plans.

(a) In general. -- As soon as practicable after the Secretary --

(1) approves, pursuant to section 1854(1) and (b) of this title, any fishery management plan or amendment; or

(2) prepares, pursuant to section 1854(c), any fishery plan or amendment; the Secretary shall publish in

the Federal Register (A) a notice of availability of such plan or amendment, and (B) any regulations which he proposes to promulgate to implement such plan or amendment. Interested persons shall be afforded a period of not less than 45 days after such publication within which to submit in writing data, views, or comments on the plan or amendment, and on the proposed regulations.

(b) Hearing. -- The Secretary may schedule a hearing, in accordance with section 553 of Title 5, on any fishery management plan, any amendment to any such plan, and any regulations to implement any such plan or amendment. If any such hearing is scheduled, the Secretary may, pending its outcome --

(A) postpone the effective date of the regulations proposed to implement such plan or amendment; or

(B) take such other action as he deems appropriate to preserve the rights or status of any person.

(c) Implementation. -- The Secretary shall promulgate regulations to implement any fishery management plan or any amendment to any such plan --

(1) after consideration of all relevant matters -

(A) presented to him during the 45-day period referred to in subsection (a) of this section, and

(B) produced in any hearing held under subsection (b) of this section; and

(2) if he finds that the plan or amendment is consistent with the

national standards, the other provisions of this chapter, and any other applicable law.

To the extent practicable, such regulation shall be put into effect in a manner which does not disrupt the regular fishing season for any fishery.

(d) Judicial review. -- Regulations promulgated by the Secretary under this chapter shall be subject to judicial review to the extent authorized by, and in accordance with, chapter 7 of Title 5, if a petition for such review is filled within 30 days after the date on which the regulations are promulgated; except that (1) section 705 of such title is not applicable, and (2) the appropriate court shall only set aside any such regulations on a ground specified in section 706(2)(A), (B), (C), or (D) of such title.

(e) Emergency actions. -- If the Secretary finds that an emergency involving any fishery resources exists, he may --

(1) promulgate emergency regulations, without regard to subsections (a) and (c) of this section, to implement any fishery management plan, if such emergency so requires; or

(2) promulgate emergency regulations to amend any regulation which implements any existing fishery management plan, to the extent required by such emergency.

Any emergency regulation which changes any existing fishery management plan shall be treated as an amendment to such plan for the period in which such regulation is in effect. Any emergency regulation promulgated under this subsection (A) shall be published in the Federal Register together with the reasons therefor; (B) shall remain in effect for not more than 45 days after

the date of such publication, except that any such regulation may be repromulgated for one additonal period of not more than 45 days; and (C) may be terminated by the Secretary at any earlier date by publication in the Federal Register of a notice of termination.

(f) Annual report. -- The Secretary shall report to the Congress and the President, not later that March 1 of each year, on all activities of the Councils and the Secretary with respect to fishery management plans, regulations to implement such plans, and all other activities relating to the conservation and management of fishery resources that were undertaken under this chapter during the preceding calendar year.

(g) Responsibility of the Secretary. -- The Secretary shall have general responsibility to carry out any fishery management plan or amendment approved or prepared by him, in accordance with the provisions of this chapter. The secretary may promulgate such regulations in accordance with section 553 of Title 5, as may be necessary to discharge such responsibility or to carry out any other provision of this chapter. Pub.L. 94-265, Title III, § 305, Apr. 13, 1976, 90 Stat. 354, amended Pub.L. 95-561, Title II, § 235, Dec. 22, 1980, 94 Stat. 3299(a) (amended 1983).

16 U.S.C. § 1856: State jurisdiction. (a) In general. -- Except as provided in subsection (b) of this section, nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries. No State may directly or indirectly

regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State.

(b) Exception. -- (1) If the Secretary finds, after notice and an opportunity for a hearing in accordance with section 554 of Title 5, that --

(A) the fishing in a fishery, which is covered by a fishery management plan implemented under this chapter, is engaged in predominately within the fishery conservation zone and beyond such zone; and

(B) any State has taken any action or omitted to take any action, the results of which will substantially and adversely affect the carrying out of such fishery management plan;

the Secretary shall promptly notify such State and the appropriate Council of such finding and of his intention to regulate the applicable fishery within the boundaries of such State (other than its internal waters), pursuant to such fishery management plan and the regulations promulgated to implement such plan.

(2) If the Secretary, pursuant to this subsection, assumes responsibility for the regulation of any fishery, the State involved may at any time thereafter apply to the Secretary for reinstatement of its authority over such fishery. If the Secretary finds that the reasons for which he assumed such regulation no longer prevail, he shall promptly terminate such regulation.

Pub.L. 94-265, Title III, § 306, Apr. 13, 1976, 90 Stat. 355 (amended 1982, 1983, and 1984)

16 U.S.C. § 1857: Prohibited Acts. It is unlawful --

(1) for any person --

(A) to violate any provision of this chapter or any regulation or permit issued pursuant to this chapter;

(B) to use any fishing vessel to engage in fishing after the revocation, or during the period of suspension, of an applicable permit issued pursuant to this chapter;

(C) to violate any provision of, or regulation under, an applicable governing international fishery agreement entered into pursuant to section 1821(c) of this title;

(D) to refuse to permit any officer authorized to enforce the provisions of this chapter (as provided for in section 1861 of this

title) to board a fishing vessel subject to such person's control for purposes of conducting any search or inspection in connection with the enforcement of this chapter or any regulation, permit, or agreement referred to in subparagraph (A) or (C);

(E) to forcibly assault, resist, oppose, impede, intimidate, or interfere with any such authorized officer in the conduct of any search or inspection described in subparagraph (D);

(F) to resist a lawful arrest for any act prohibited by this section;

(G) to ship, transport, offer for sale, sell, purchase, import, export, or have custody, control, or possession of, any fish taken or retained in violation of this

chapter or any regulation, permit, or agreement referred to in subparagraph (A) or (C); or

(H) to interfere with, delay, or prevent, by any means, the apprehension or arrest of another person, knowing that such other person has committed any act prohibited by this section;

(2) for any vessel other than a vessel of the United States, and for the owner or operator of any vessel other than a vessel of the United States, to engage in fishing --

(A) within the boundaries of any State; or

(B) within the fishery conservation zone, or for any anadromous species or Continental Shelf fishery resources beyond such zone, unless such fishing is authorized by, and conducted in accordance with, a

valid and applicable permit issued pursuant to section 1824(b) or (c) of this title; and

(3) for any vessel of the United States, and for the owner or operator of any vessel of the United States, to transfer directly or indirectly, or attempt to so transfer, any United States harvested fish to any foreign fishing vessel, while such foreign vessel is within the fishery conservation zone, unless the foreign fishing vessel has been issued a permit under section 1824 of this title which authorizes the receipt by such vessel of United States harvested fish of the species concerned.

Pub.L. 94-265, Title III, § 307, Apr. 13, 1976, 90 Stat. 355, amended Pub.L. 95-354, § 5(4), Aug. 28, 1978, 92 Stat. 521 (amended 1982 and 1983).

16 U.S.C. § 1860: Civil Forfeitures.

(a) In general. -- Any fishing vessel (including its fishing gear, furniture, appurtenances, stores, and cargo) used, and any fish taken or retained in any manner, in connection with or as a result of the commission of any act prohibited by section 1857 of this title (other than any act for which the issuance of a citation under section 1861(c) of this title is sufficient sanction) shall be subject to forfeiture to the United States. All or part of such vessel may, and all such fish shall, be forfeited to the United States pursuant to a civil proceeding under this section.

(b) Jurisdiction of courts. -- Any district of the United States which has jurisdiction under section 1861(d) of this title shall have jurisdiction, upon application by the Attorney General on behalf of the United States, or order any forfeiture authorized under subsection (a) of this section and

any action provided for under subsection (d) of this section.

(c) Judgment. -- If a judgment is entered for the United States in a civil forfeiture proceeding under this section, the Attorney General may seize any property or other interest declared forfeited to the United States which has not previously been seized pursuant to this chapter or for which security has not previously been obtained under subsection (d) of this section. The provisions of the custom laws relating to --

(1) the disposition of forfeited property,

(2) the proceeds from the sale of forfeited property,

(3) the remission or mitigation of forfeiture, and

(4) the compromise of claims,

shall apply to any forfeiture ordered, and to any case in which forfeiture is

alleged to be authorized, under this section, unless such provisions are inconstistent with the purposes, policy, and provisions of this chapter. The duties and powers imposed upon the Commissioner of Customs or other persons under such provisions shall, with respect to this chapter be performed by officers or other persons designated or such purpose by the Secretary.

(d) Procedure. -- (1) any officer authorized to serve any process in rem which is issued by a court having jurisdiction under section 1861(d) of this title shall --

(A) stay the execution of such process; and

(B) discharge any fish seized pursuant to such process;

upon the receipt of a satisfactory bond or other security from any person claiming

shall be conditioned upon such person (i) delivering such property to the appropriate court upon order thereof, without any impairment of its value, or (ii) paying the monetary value of such property pursuant to an order of such court. Judgment shall be recoverable on such bond or other security against both the principal and any sureties in the event that any condition thereof is breached, as determined by such court.

(2) Any fish seized pursuant to this chapter may be sold, subject to the approval and direction of the appropriate court, for not less than the fair market value thereof. The proceeds of any such sale shall be deposited with such court pending the disposition of the matter involved.

(e) Rebuttable presumption. -- For purposes of this section, it shall be a rebuttable presumption that all fish found on board a

fishing vessel which is seized in connection with an act prohibited by section 1857 of this title were taken or retained in violation of this chapter .

Pub.L. 94-265, Title III, § 310, Apr. 13, 1976, 90 Stat. 357 (amended 1983).

16 U.S.C. § 1861: Enforcement

(a) Responsibility. -- The provisions of this chapter shall be enforced by the Secretary and the Secretary of the department in which the Coast Guard is operating. Such Secretaries may, by agreement, on a reimbursable basis or otherwise, utilize the personnel, services, equipment (including aircraft and vessels), and facilities of any other Federal agency, including all elements of the Department of Defense, and of any State agency, in the performance of such duties. Such Secretaries shall report annually on June 30, to each committee of the Congress listed in section 1823(b) of

this title and to the Councils, on the degree and extent of known and estimated compliance with the provisions of this chapter during the preceding calendar year.

(b) Powers of authorized officers. -- Any officer who is authorized by the Secretary, the Secretary of the department in which the Coast Guard is operating, or the head of any Federal or State agency which has entered into an agreement with such Secretaries under subsection (a) of this section to enforce the provisions of this chapter may --

(1) with or without a warrant or other process --

(A) arrest any person, if he has reasonable cause to believe that such person has committed an act prohibited by section 1857 of this chapter;

(B) board, and search or inspect, any fishing vessel which is subject to the provisions of this chapter;

(C) seize any fishing vessel (together with its fishing gear, furniture, appurtenances, stores, and cargo) used or employed in, or with respect to which it reasonably appears that such vessel was used or employed in, the violation of any provision of this chapter;

(D) seize any fish (wherever found) taken or retained in violation of any provision of this chapter; and

(E) seize any other evidence related to any violation of any provision of this chapter;

(2) execute any warrant or other process issued by any court of competent jurisdiction; and

(3) exercise any other lawful authority.

(c) Issuance of citations. -- If any officer authorized to enforce the provisions of this chapter (as provided for in this section) finds that a fishing vessel is operating or has been operated in violation of any provision of this chapter, such officer may, in accordance with regulations issued jointly by the Secretary and the Secretary of the department in which the Coast Guard is operating, issue a citation to the owner or operator of such vessel in lieu of proceeding under subsection (b) of this section. If a permit has been issued pursuant to this chapter for such vessel, such officer shall note the issuance of any citation under the permit. The Secretary shall maintain a record of all citations issued pursuant to this subsection.

(d) Jurisdiction of courts. -- The district courts of the United States shall have exclusive jurisdiction over any case or controversy arising under the provisions of this chapter. In the case of Guam, and any Commonwealth, territory or possession of the United States in the Pacific Ocean, the appropriate court is the United States District Court for the District of Guam, except in the case of American Samoa, the appropriate court is the United States District Court for the District of Hawaii. Any such court may, at any time --

(1) enter restraining orders or prohibitions;

(2) issue warrants, process in rem, or other process;

(3) prescribe and accept satisfactory bonds or other security; and

(4) take such other actions as are in the interest of justice.

(e) Definition. -- For purposes of this section --

(1) The term "provision of this chapter" includes (A) any regulation or permit issued pursuant to this chapter and (B) any provision of, or regulation issued pursuant to, any international fishery agreement under which foreign fishing is authorized by section 1821(b) or (c) of this title, with respect to fishing subject to the exclusive fishery management authority of the United States.

(2) The term "violation of any provision of this chapter" includes (A) the commission of any act prohibited by section 1857 of this title, and (B) the violation of any regulation, permit, or agreement referred to in paragraph (1).

Pub.L. 94-265. Title III, § 311, Apr. 13, 1976, 90 Stat. 358, amended Pub.L. 96-470,

Title II, § 209(e), Oct. 19, 1980, 94 Stat. 2245 (amended 1983).

Other Statutes

28 U.S.C. § 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

46 U.S.C. § 911. Words and terms used in chapter

When used in this chapter --

(1) the term "document" includes registry and enrollment and license;

(2) The term "document" means registered or enrolled or licensed under the laws of the United States, whether permanently or temporarily;

(3) Except as provided in section 1011 of this title, the term "port of documentation" means the port at which the vessel is documented, in accordance with law;

(4) The term "vessel of the United States" means any vessel documented under the laws of the United States and . . . [copy ends here]

APPENDIX F

FEDERAL REGULATIONS

TANNER CRAB OFF ALASKA

Subpart A -- General

§671.1 Purpose and scope.

(a) This part regulates fishing for Tanner crab by vessels of the United States within that portion of the Bering Sea and Gulf of Alaska over which the United States exercises exclusive fishery management authority. These regulations implement the Tanner crab fishery management plan developed by the North Pacific Fishery Management Council.

(b) For regulations governing fishing for Tanner crab in the Gulf of Alaska and Bering Sea by fishing vessels other than vessels of the United States, see 50 CFR 611.91.

§ 671.2 Definitions.

In addition to the definitions in the Act, and unless the context requires otherwise, the terms used in this part

shall have the following meanings (some definitions in the Act have been repeated here to aid understanding of the regulations):

Act means the Fishery Conservation and Management Act of 1976, 16 U.S.C. 1801 et seq. as amended.

ADF&G means the Alaska Department of Fish and Game.

Assistant Administrator means the Assistant Administrator for Fisheries, National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce, or an individual to whom appropriate authority has been delegated.

Authorized Officer means:

(a) Any commissioned, warrant, or petty officer of the United States Coast Guard;

(b) Any certified enforcement agent or special agent of the National Marine Fisheries Service;

(c) Any officer designated by the head of any Federal or State agency which has entered into an agreement with the Secretary of Commerce or the Commandant of the Coast Guard to enforce the provisions of the Act; or

(d) Any Coast Guard personnel accompanying and acting under the direction of any person described in paragraph (a) of this definition.

Council means the North Pacific Fishery Management Council, P.O. Box 103136, Anchorage, AK 99510, telephone 907-274-4563.

Fishery conservation zone (FCZ) means that area adjacent to the United States which, except where modified to accommodate international boundaries, encompasses all water from the seaward

boundary of each of the coastal States to a line on which each point is 200 nautical miles from the baseline from which the territorial sea of the United States is measured.

Fishing means any activity, other than scientific research, which involves:

(a) The catching, taking or harvesting of fish;

(b) The attempted catching, taking or harvesting of fish;

(c) Any other activity which can reasonably be expected to result in the catching, taking or harvesting of fish; or

(d) Any operations at sea in support of, or in preparation for, any activity described in paragraphs (a), (b), or (c) of this definition.

Fishing vessel means any vessel, boat, ship, or other craft which is used for, equipped to be used for, or of a type

which is normally used for (a) fishing or (b) aiding or assisting one or more vessels at sea in the performance of any activity relating to fishing, including, but not limited to, preparation, supply, storage, refrigeration, transportation, or processing.

FMP means the Fishery Management Plan for the Commercial Tanner Crab Fishery off the Coast of Alaska.

Landing means off-loading fish (including Tanner crab).

Operator, with respect to any vessel, means the master or other individual on board and in charge of that vessel.

Owner, with respect to any vessel, means:

(a) Any person who owns that vessel in whole or in part;

(b) Any charterer of the vessel, whether bareboat, time or voyage;

(c) Any person who acts in the capacity of a charter, including but not limited to parties to a management agreement, operating agreement, or any similar agreement that bestows control over the destination, function or operation of the vessel; or

(d) Any agent designated as such by any person in paragraph (a), (b), or (c) of this definition.

Person means any individual (whether or not a citizen or national of the United States), corporation, partnership, association, or other entity (whether or not organized or existing under the laws of any State), and any Federal State, local, or foreign government or any entity of any such government.

Regional Director means the Director, Alaska Region, National Marine Fisheries Service, Box 1668, Juneau, Alaska, 99802 or

an individual to whom appropriate authority has been delegated.

Registration Area A (Southeastern Alaska-Yakutat) is that portion of the FCZ in the Gulf of Alaska east of 143°53'36" W. longitude (Cape Suckling).

Registration Area E (Prince William Sound) is that portion of the FCZ between 143°53'36" W. longitude (Cape Suckling) and 148°53' W. longitude (Cape Fairfield).

Registration Area H (Cook Inlet) is that portion of the FCZ lying west of 143°53' W. longitude (Cape Fairfield) and north of 58°52' N. latitude (Cape Douglas).

Registration Area J (Westward) includes the FCZ in the Bering Sea, and that part of the FCZ in the Gulf of Alaska between 148°53' W. longitude (Cape Fairfield) and 172° E. longitude south of 58°52' N. latitude (Cape Douglas).

Ring net means a bag-shaped net suspended from a circular or retangular frame.

Tanner crab means all species of the genus Chionoecetes including C. bairdi and C. opilio.

Tanner crab pot means a live-capture pot with either (1) side-loading, rigid tunnel eye openings that are individually a maximum of 5 inches (13 cm) in one dimension, and tunnel eye opening perimeters that individually are larger that 30 inches (76 cm), or (2) a single, top-loading, horizontal opening of any size.

Vessel of the United States means:

(a) A vessel documented or numbered by the Coast Guard unde United States law; or

(b) A vessel, under five net tons, which is registered under the laws of any state.

[45 FR 72669, Nov. 3, 1980, as amended at 46 FR 57303, Nov. 23, 1981; 48 FR 40729, Sept. 9, 1983; 49 FR 35780, Sept. 12 1984]

EFFECTIVE DATE NOTE: At 49 FR 35780, Sept. 12, 1984, definitions for council and FMP were added to § 671.2, effective October 7, 1984.

§ 671.3 Relation to other laws.

(a) Delegation. The Assistant Administrator has delegated to the Regional Director authority to make in-season adjustments pursuant to § 671.27 of this part.

(b) Other agreements. Certain responsibilities relating to the administration of this part will be performed by personnel of the State of Alaska under the terms of an agreement with NOAA/NMFS and the United States Coast Guard.

§ 671.4 Reporting requirements.

(a) The operator of any fishing vessel subject to this part whose port of

landing is in the United States is responsible for the submission of an accurately completed State of Alaska fish ticket for each sale or delivery of any Tanner crab covered by this part.

(b) At the election of the vessel operator, the fish ticket shall be either: (1) Submitted by the vessel operator directly to the ADF&G within one week after such Tanner crab are sold or delivered; or (2) prepared, at the request of the operator, by the purchaser (i.e., any person who receives Tanner crab for a commercial purpose from a fishing vessel subject to this part) and submitted by the purchaser to the ADF&G within one week after such Tanner crab are received by the purchaser.

(c) In addition to the requirements of paragraphs (a) and (b) of this section, each operator (or purchaser, if the fish ticket is submitted in accordance with paragraph (b)(2)) shall also accurately

state on each such fish ticket: (1) Total time fished; (2) total number of pot lifts; and (3) quantity and type of gear used.

(d) The operator of any fishing vessel subject to this part whose port of landing is outside the State of Alaska shall submit a completed State of Alaska fish ticket, or an equivalent document containing all of the information required on an Alaska fish ticket and in § 671.4(c), to the ADF&G within one week after the date of each sale or delivery of any Tanner crab. [Sample alternative document reserved.]

(e) Any U.S. processor who receives Tanner crab by way of purchase, barter, trade, or sale from a U.S. fishing vessel or prior purchaser subject to this part shall provide, when requested to do so by the Regional Director, but in no event more than twice a year, the following information by Tanner crab species:

(1) Actual plant capacity to process Tanner crab in the next fishing year, in terms of weight, and

(2) The estimated actual amount by weight of Tanner crab to be processed in the coming fishing year.

(Paragraphs (a) through (d) approved by the Office of Management and Budget under control number 0648-0016 and paragraph (e) under control number 0648-0114)

[45 FR 72669, Nov. 3, 1980, as amended at 48 FR 34762, Aug. 1, 1983]

§ 671.5 General prohibitions.

It is unlawful for any person to:

(a) Fish for, take, or retain Tanner crab in violation of the Act, this part, or any regulation or permit issued under the Act, including but not limited to the following: during closed season or in closed areas specified in Subpart B; after closure of an area when a catch limitation is reached, or as otherwise announced by a

field order issued under this part, except that C. bairdi Tanner crab taken incidentally to permitted fishing for C. opilio Tanner crab in the area north of 58° N. latitude and west of 164° W. longitude may be retained:

(b) Take and retain Tanner crab in violation of § 671.22 of this part;

(c) Possess, have custody or control of, ship, transport, offer for sale, sell, purchase, import, land, or export any Tanner crab taken in violation of the Act, this part, or any other regulation or permit issued under the Act;

(d) Refuse to permit an Authorized Officer to board a fishing vessel subject to such person's control for purposes of conducting any search or inspection in connection with the enforcement of the Act, this part, or any other regulation or permit issued under the Act;

(e) Forcibly assault, resist, oppose, impede, intimidate, or interfere with any Authorized Officer in the conduct of any search or inspection described in paragraph (d) of this section;

(f) Resist a lawful arrest for any act prohibited by this part; or

(g) Interfere with, delay, or prevent, by any means, the apprehension or arrest of another person knowing that such other person has committed any act prohibited by this part.

§ 671.6 Enforcement.

(a) General. The operator of, or any other person aboard, any fishing vessel subject to this part must immediately comply with instructions and signals issued by an authorized officer to stop the vessel and with instructions to facilitate safe boarding and inspection of the vessel, its gear, equipment, fishing record (where

applicable), and catch for purposes of enforcing the Magnuson Act and this part.

(b) Communications. (1) Upon being approached by a U.S. Coast Guard vessel or aircraft, or other vessel or aircraft, or other vessel or aircraft with an authorized officer aboard, the operation of a fishing vessel must be alert for communications conveying enforcement instructions.

(2) If the size of the vessel and the wind, sea, and visibility conditions allow, loudhailer is the preferred method for communicating between vessels. If use of a loudhailer is not practicable, and for communications with an aircraft, VHF-FM or high frequency radiotelephone will be employed. Hand signals, placards, or voice may be employed by an authorized officer and message blocks may be dropped from an aircraft.

(3) If other communications are not practicable, visual signals may be transmitted by flashing light directed at the vessel signaled. Coast Guard units will normally use the flashing light signal "L" as the signal to stop.

(4) Failure of a vessel's operator to stop his vessel when directed to do so by an authorized officer using loudhailer, radiotelephone, flashing light signal, or other means constitutes prima facie evidence of the offense of refusal to permit an authorized officer to board.

(5) The operator of a vessel who does not understand a signal from an enforcement unit and who is unable to obtain clarification by loudhailer or radiotelephone must consider the signal to be a command to stop the vessel instantly.

(c) Boarding. The operator of a vessel directed to stop must

(1) Guard Channel 16, VHF-FM if so equipped;

(2) Stop immediately and lay to or manuever in such a way as to allow the authorized officer and his party to come aboard;

(3) Except for those vessels with a freeboard of four feet or less, provide a safe ladder, if needed, for the authorized officer and his party to come aboard.

(4) When necessary to facilitate the boarding or when requested by an authorized officer, provide a manrope or safety line, and illumination for the ladder; and

(5) Take such other actions as necessary to facilitate boarding and to ensure the safety of the authorized officer and the boarding party.

(d) Signals. The following signals, extracted from the International Code of Signals, may be sent by flashing light by

an enforcement unit when conditions do not allow communications by loudhailer or radiotelephone. Knowledge of these signals by vessel operators is not required. However, knowledge of these signals and appropriate action by a vessel operator may preclude the necessity of sending the signal "L" and the necessity for the vessel to stop instantly.

(1) "AA" repeated (.-.-) [1,2] is the call to an unknown station. The operator of the signaled vessel should respond by identifying the vessel by radiotelephone or by illuminating the vessel's identification.

(2) "RY-CY (.-. -.-- -.-. -.--) means "you should proceed at slow speed, a boat is coming to you." This signal is

---

[1]Period (.) means a short flash of light.

[2]Dash (-) means a long flash of light.

normally employed when conditions allow an enforcement boarding without the necessity of the vessel being boarded coming to a complete stop, or, in some cases, without retrieval of fishing gear which may be in the water.

(3) "SQ3" (... --.- ...--) means "you should stop or heave to; I am going to board you."

(4) "L" (.-..) means "you should stop your vessel instantly."

[49 FR 9736, Mar. 15, 1984]

§ 671.7 Penalties.

Any person or fishing vessel found to be in violation of this part will be subject to the civil and criminal penalty provisions and forfeiture provisions prescribed in the Act, and 50 CFR Parts 620 (Citations) and 621 (Civil Procedures), and other applicable law.

Subpart B -- Management Measures

§ 671.21 Optimum yield.

(a) Table. The optimum yield for Tanner crab for each Federal registration area is set forth in Table I. These specifications of optimum yield are effective for the fishing year beginning on November 1, and ending on October 31.

TABLE 1 -- OPTIMUM YIELDS (MILLIONS OF POUNDS) OF TANNER CRAB STOCKS IN THE FISHING DISTRICTS OR REGISTRATION AREAS OFF ALASKA[1]

Registration area-District	Optimum Yield
Southeastern (A):	
Southeast	1.0 to 3.0
Yakutat	0.1 to 1.0
Prince William Sound (E)	1.5 to 3.5
Cook Inlet (H)	1.5 to 3.0
Westward (J)	
Kodiak	11.0 to 33.0
Chignik	0.5 to 5.0
South Peninsula	2.0 to 6.0
Eastern Aleutians	0.1 to 2.0

[1]Catches of Tanner crab in a State of Alaska registration area or district will be considered part of the optimum yield specified for the contiguous Federal registration area or district of the same name.

TABLE 1 -- OPTIMUM YIELDS (MILLIONS OF POUNDS) OF TANNER CRAB STOCKS IN THE FISHING DISTRICTS OR REGISTRATION AREAS OFF ALASKA[1] - continued

Registration area-District	Optimum Yield
Western Aleutians	0.1 to 2.0
Bering Sea:	
C. bairdi	5.0 to 28.5
C. opilio	20.0 to 130.5[2]

(b) Limitation. Except that C. bairdi Tanner crab taken for C. opilio Tanner crab in the area north of 58° N. latitude and west of 164° W. longitude may be also be retained.

(c) Field orders. Except as provided in § 671.21(b), if the Regional Director determines that the optimum yield for a particular species of Tanner crab in any geographic area specified in Table I will be reached, the Secretary shall issue a field order pursuant to § 671.27(a) prohibiting fishing for that particular

---

[2]Equals domestic annual harvest.

species of Tanner crab by vessels of the United States in the applicable geographic area from the effective date of the field order.

[45 FR 72669, Nov. 3, 1980, as amended at 46 FR 57305, Nov. 23, 1981; 49 FR 35780, Sept. 12, 1984]

EFFECTIVE DATE NOTE: At 49 FR 35780, Sept. 12, 1984, § 571.21 was amended by revising Table 1, effective October 7, 1984. For the convenience of the user, the superseded table appears as below:

§ 671.21 Optimum yield.

(a) * * *

TABLE I

Registration area	Optimum Yield[1]		Species
	Metric tons	Millions of pounds	
A (Southeast-Yakutat)	2,495	5.5	All.
E (Prince William Sound)	3,175	7.0	All.
H (Cook Inlet)	2,404	5.3	All.
J (Kodiak District	15,876	35.0	All.
J (South Peninsula District)	2,722	6.0	All.
J (Chignik District)	2,268	5.0	All.
J (Aleutian District)	907	2.0	All.
J (Bering Sea District)	12,701-	28.0-	
	16,329	36.0	C. bairdi
	17,914-	39.5-	
	41,277	91.0	O. opilio

[1]Catches of Tanner crab in a State of Alaska registration area or district will be considered part of the optimum yield specified for the contiguous Federal registration area or district of the same name.

§ 671.22 Size and sex restrictions.

(a) Female Tanner crabs. No female Tanner crab may be retained.

(b) Male Tanner crab. No male Tanner crab of the species C. bairdi measuring less than 5.5 inches (140 mm) across the greatest width of carapace may be retained, except that male Tanner crab of the species C. bairdi in Federal registration area E (Prince William Sound) may be retained if they measure 5.3 inches (135 mm) or greater across the greatest width of the carapace. No male Tanner crab of the species C. opilio measuring less than 3.1 inches (78 mm) across the greatest width of the carapace may be retained. The width measurement of Tanner crab is determined by measuring the greatest straight line distance across the carapace, including the spines, perpendicular to an imaginary line drawn between the eyes and the midpoint of the posterior portion of the carapace.

(c) General. All female and undersized male Tanner crabs of the species C. bairdi must be returned to the sea immediately with a minimum of injury, regardless of their condition.

[FR 72669, Nov. 3, 1980, as amended at 48 FR 40729, Sept. 9, 1983]

§ 671.23 Vessel registration.

(a) Requirement. Any vessel of the United States fishing for Tanner crab must be registered for fishing in such area pursuant to this section.

(b) Applications: (1) The owner (or the owner's authorized agent) of a fishing vessel desiring to fish for Tanner crab in a Federal registration area, not registered for a State of Alaska registration area contiguous with such Federal registration area, must submit to the Regional Director, within 30 days prior to the scheduled opening of fishing in the Federal registration area, a completed

State of Alaska registration form to be used as a Federal form.

(2) A fishing vessel registered for a State of Alaska registration area will be deemed to be registered for the contiguous Federal registration area.

(c) Registration certificate. The registration certificate shall be signed by the owner (or the owner's authorized agent), shall be kept onboard by the operator at all times during fishing operations, and shall be shown by the operator upon request to any Authorized Officer.

(d) Registration validation. A registration certificate is not valid until the fishing vessel has complied with the inspection requirements contained in § 671.24 of this part. A valid registration certificate becomes invalid:

(1) Upon landing Tanner crab in a Federal registration area other than the

area for which the vessel is registered (or other than the contiguous State of Alaska registration area); or

(2) Seventy-two (72) hours after the close of the season for the applicable Federal registration area, whichever occurs first.

(e) Late registration. The late registration of any fishing vessel may be permitted by the Regional Director in the case of the loss of a registered fishing vessel. For purposes of this paragraph, "loss of a registered fishing vessel" means that the fishing vessel is incapable of being used to take Tanner crab during the open Tanner crab season in the area for which it is registered. An application for late registration under this paragraph shall be documented by submission of adequate proof, in writing, concerning the loss of the vessel. The late registration

shall be for the Federal registration area in which the lost fishing vessel was registered.

(f) Expiration. A registration certificate expires on the last day of the registration year. Registration for any subsequent year shall be obtained by re-application in accordance with the procedure set forth in this section.

(g) Registration year. The registration year shall be August 1 through July 31.

(h) Exclusive registration areas. (1) Federal registration areas E and H are exclusive registration areas. No fishing vessel registered for an exclusive Federal registration area may be registered for any other Federal registration area (exclusive or non-exclusive) during a registration year.

(2) A fishing vessel registered for an exclusive State of Alaska registration area may register only in the contiguous Federal exclusive registration area during that registration year.

(3) No operator of a fishing vessel registered for an exclusive Federal registration area may operate any other fishing vessel registered for any other exclusive Federal registration area.

(i) Non-exclusive registration areas. Federal registration areas A and J are non-exclusive registration areas. A fishing vessel may be registered for any or all of the non-exclusive Federal registration areas during any registration year.

§ 671.24 Vessel inspection.

(a) Inspection. (1) Within 24 hours prior to fishing for Tanner crab for the first time during an open season each registered fishing vessel must have its holds and live tanks, if any, inspected by

an Authorized Officer at an inspection point specified in paragraph (b) of this section.

(2) Requirement. A registration certificate will not be validated if there are Tanner crab on board the fishing vessel at the time of inspection.

(3) Certificate. No fishing vessel will be issued an inspection certificate unless a current registration certificate for the contiguous Federal registration area is displayed to the Authorized Officer conducting the inspection. The inspection certificate shall be signed by the current fishing vessel operator, shall be kept on board by the operator at all times during fishing operations, and shall be shown by the operator upon request to any Authorized Officer.

(b) Inspection points. Inspection points are those established by the ADF and

G for State of Alaska purposes and by these regulations for Federal purposes. Additional inspection points may be authorized by the Regional Direction if the Regional Director finds that:

(1) Existing inspection points are imposing an unusual and material hardship which affected fishermen cannot themselves mitigate; or

(2) The ADF and G has no practical means of making special administrative accommodations regarding existing inspection points; and.

(3) Authorization of additional inspection points would not result in a significant likelihood of unauthorized fishing or other management or enforcement problems.

[45 FR 72669, Nov. 3, 1980, as amended at 46 FR 57303, Nov. 23, 1981]

§ 671.25 Landing requirements.

(a) Except as provided in paragraph (b) of this section, all Tanner crab must be landed in the State of Alaska registration area contiguous to a Federal registration area for which the fishing vessel is registered.

(b) The operator of a fishing vessel who desires to land Tanner crab outside the State of Alaska, or in a State registration area other than the State registration area contiguous to a Federal registration area for which the fishing vessel is registered, shall contact, by radio or other means, an Authorized Officer prior to leaving Federal registration area for which the fishing vessel is registered, and shall state to the Authorized Officer the amount of Tanner crab on board at the time. A fishing vessel operator acting pursuant to this

pararaph shall submit the vessel to inspection at such location as the Authorized Officer may require. The operator shall not land an amount of Tanner crab which is more than one hundred and ten (110) percent or less than ninety (90) percent of the amount stated to be present onboard upon leaving the Federal registration area, or observed to be present onboard at the time of any inspection.

(c) Certificate validity. If a fishing vessel lands Tanner crab pursuant to paragraph (b) of this section, the registration certificate of the fishing vessel becomes invalid. To again become validly registered for a Federal registration area, the fishing vessel must be reinspected pursuant to the procedures of § 671.24 of this part.

§ 671.26 Season, general gear restrictions, and registration areas.

(1) Season dates - (1) Criteria for setting opening and closing dates. The Council may recommend to the Regional Director Tanner crab season opening and closing dates that it finds to be necessary in accordance with the following factors:

(i) Deadloss - the need to prevent or minimize deadloss, i.e., mortality of crab prior to porcessing.

(ii) Recovery rate - the need to increase the meat recovery rate.

(iii) Weather - the need to schedule seasons to avoid severe weather conditions.

(iv) Costs - the need to minimize costs to the industry.

(v) Other fisheries - the need to consider demands by other fisheries on harvesting, processing, and transportation systems.

(vi) Coordinated season timing - the need to distribute fishing effort and thus prevent gear saturation in a particualr [sic] area.

(vii) Enforcement and management costs - the need to consider costs of enforcement and management before, during, and after an open season.

(2) Procedures - (i) As soon as practicable after the Council has recommended to the Regional Director season opening and closing dates, the Secretary will publish an initial notice in the FEDERAL REGISTER specifying the proposed dates. Public comments on the proposed dates and whether they are consistent with the objectives of the FMP will be invited for a period of 30 days after this notice is published in the FEDERAL REGISTER.

(ii) Within 45 days after the end of the comment period, the Secretary will

publish a second notice approving, disapproving, or partially disapproving the proposed season dates based on comments received and his determination on whether the dates based on comments received and his determination on whether the dates are consistent with the objectives of the FMP, the national standards of the Magnuson Act, and other applicable law. Season opening and closing dates presented under this paragraph will remain in effect until the Secretary issues a notice approving changes to those dates.

(b) General gear restrictions. (1) At least one buoy on each Tanner crab pot or ring net shall be legibly marked with the permanent ADF and G vessel license number of the fishing vessel using the gear or, if a fishing vessel does not have a permanent ADF and G vessel license number, with the official documentation number of the fishing vessel operating the gear.

Identification numbers shall be painted on the top one-third of the buoy in numerals at least 4 inches in height and 1/2 inch in width in contrasting color to that of the buoy. The buoy markings shall be legible and visible on the buoy above the water surface when attached to the Tanner crab pot, and maintained in a legible condition.

(2) All Tanner crab pots shall contain an opening in the webbing of a side wall of the pot which has been laced, sewn, or secured together by untreated cotton twine or other natural fiber no larger than 120 thread, which upon deterioration or parting of the twine produces an opening in the web with a perimeter equal to or exceeding one half of the tunnel eye opening perimeter.

(3) During any period when fishing for all species of Tanner crab is prohibited in any Federal registration area, Tanner crab pots shall either be removed

from the water or stored in less that 25 fathoms (46m) of water, with all doors secured fully open and all bait and bait containers removed, with the following exceptions.

(i) In the Kamishak Bay and Southern districts of the Cook Inlet area, the maximum pot storage depth is 15 fathoms (27m);

(ii) Tanner crab pots with all doors secured fully open and with all bait and bait containers removed may be stored in water depth greater than the maximum permissible storage depth for 72 hours after the season closure where the pots are fished.

(iii) Tanner crab pots may be stored in waters deeper than 25 fathoms (46m) if specifically allowed by this section.

(c) Registration Area A - (1) Districts. The following districts within Registration Area A are established:

(i) Southeast District: All waters between Dixon Entrance and a line projected southwest (225° true north) from the westernmost tip of Cape Fairweather.

(ii) Yakutat District: All waters between a line projected southwest from the westernmost tip of Cape Fairweather and the longitude of Cape Suckling (143°53' W. longitude).

(2) Seasons. (i) Tanner crab may be taken in the Southeast District from December 1 through May 1, subject to adjustment by the Secretary of Commerce under § 671.27 of this part.

(ii) Tanner crab may be taken in the Yakutat District from February 1 through May 15, subject to adjustment by the Secretary of Commerce under § 671.27 of this part.

(3) Gear. Tanner crab may be taken in the Yakutat District with top loading pots only.

(d) Registration Area E - (1) Districts. The following districts within Federal Registration Area E are established:

(i) Western District: All waters east of the longitude of Cape Fairfield (148°53' W. longitude) south of a line from the southern entrance of Port Nellie Juan at 60°36' N. latitude to Point Eleanor (60°34'42" N. latitude, 147°34'6" W. longitude) to the eastern tip of Smith Island (60°31'42" N. latitude, 147°19'W. longitude) to Montague Point (60°22'18" N. latitude, 147°06'0" W. longitude), west of a line from Zaikof Point (60°18'12" N. latitude, 146°55'42" W. longitude) to Seal Rocks (60°10' N. latitude, 146°50' W. longitude) and west of the longitude of Seal Rocks.

(ii) Eastern District: All waters east of the longitude of Seal Rocks (60°10' N. latitude, 146°50' W. longtitude), east of a line from Seal Rocks, to Cape

Hinchinbrook (60°15'54" N. latitude, 146°37'18" W. longitude), south of line from Point Bentinck (60°23'24" No. latitude, 146°05'36" W. Longitude) to Point Whitshed (60°26'36" N. latitude, 145°53'12" W. longitude), and west of the longitude of Cape Suckling (51°59' N. latitude, 143°53'36" W. longitude).

(iii) Hinchinbrook District: All waters east of a line from Montague Point to the eastern tip of Smith Island, south of a line from the eastern tip of Smith Island to Johnstone Point (60°28'48" N. latitude, 146°37'18" W. longitude), and east of a line from Seal Rocks to Zaikof Point.

(2) Seasons. Tanner crab may be taken in Registration Area E from November 15 through May 31 only, subject to adjustment by the Secretary pursuant to § 671.27 of this part.

(3) Gear. (i) Only Tanner crab pots may be used to fish for Tanner crab. Tanner crab taken by any other means must be returned immediately to the sea, with a minimum of injury, regardless of their condition.

(ii) Two escape rings, 4-3/4 inches (121 mm) in minimum inside diameter, so located on the vertical plane to permit the escape of undersized crabs, shall be provided for each Tanner crab pot.

(e) Registration Area H - (1) Districts. the following districts within Registration area H are established:

(i) Central District: All waters between a line extending from Boulder Point at 60°46'23" N. latitude, to Shell Platform C (60°45'50" N. latitude, 151°30'08" W. longitude), then to a point on the west shore at 60°46'23" N. latitude, and the latitude of Anchor Point Light (59°40'12" N. latitude, 151°52' W. longitude).

(ii) Southern District: All waters within a line from Anchor Point Light west to 59°46'15" N. latitude, 152°20' W. longitude, then south to 59°04'15" N. latitude, 152°20' W. longitude, then in a northeasterly direction to Cape Elizabeth (59° 9'12" N. latitude; 151°53'18" W. longitude), then from Cape Elizabeth to Point Adam, (59°15' 12" N. latitude; 151° 58'48" W. longitude, including Kamishak Bay.

(iii) Kamishak Bay District: All waters within a line from 59°46'15" N. latitude, 153°00'30" W. longitude, then east to 59°46'15" N. latitude, 152°20' W. longitude, then south to 59°04'15" N. latitude, 152°20' W. longitude, then south- westerly to Cape Douglas (58°50'54" N. latitude, 153°16'24" W. longitude), including Kamishak Bay.

(iv) Barren Islands District: All waters within a line from Cape Douglas to Cape Elizabeth, then south to 58°52' N.

latitude, 151°53' W. longitude, then west to Cape Douglas.

(v) Outer District: All waters within a line from Point Adam to Cape Elizabeth, then south to 58°52' N. latitude, 151°53' W. longitude, then east to the longitude of Aligo Point (149°44'33" W. longitude), then north to the mainland of Alaska.

(vi) Eastern District: all waters east of the longitude of Aligo Point (149°44' 33" W. longitude), west of the longitude of Cape Fairfield (148°53' W. longitude), and north of 58°52' N. latitude.

(2) Seasons. (i) Tanner crab may be taken in the Southern district from December 1 through April 30 only, subject to adjustment by the Secretary pursuant to § 671.27 of this part.

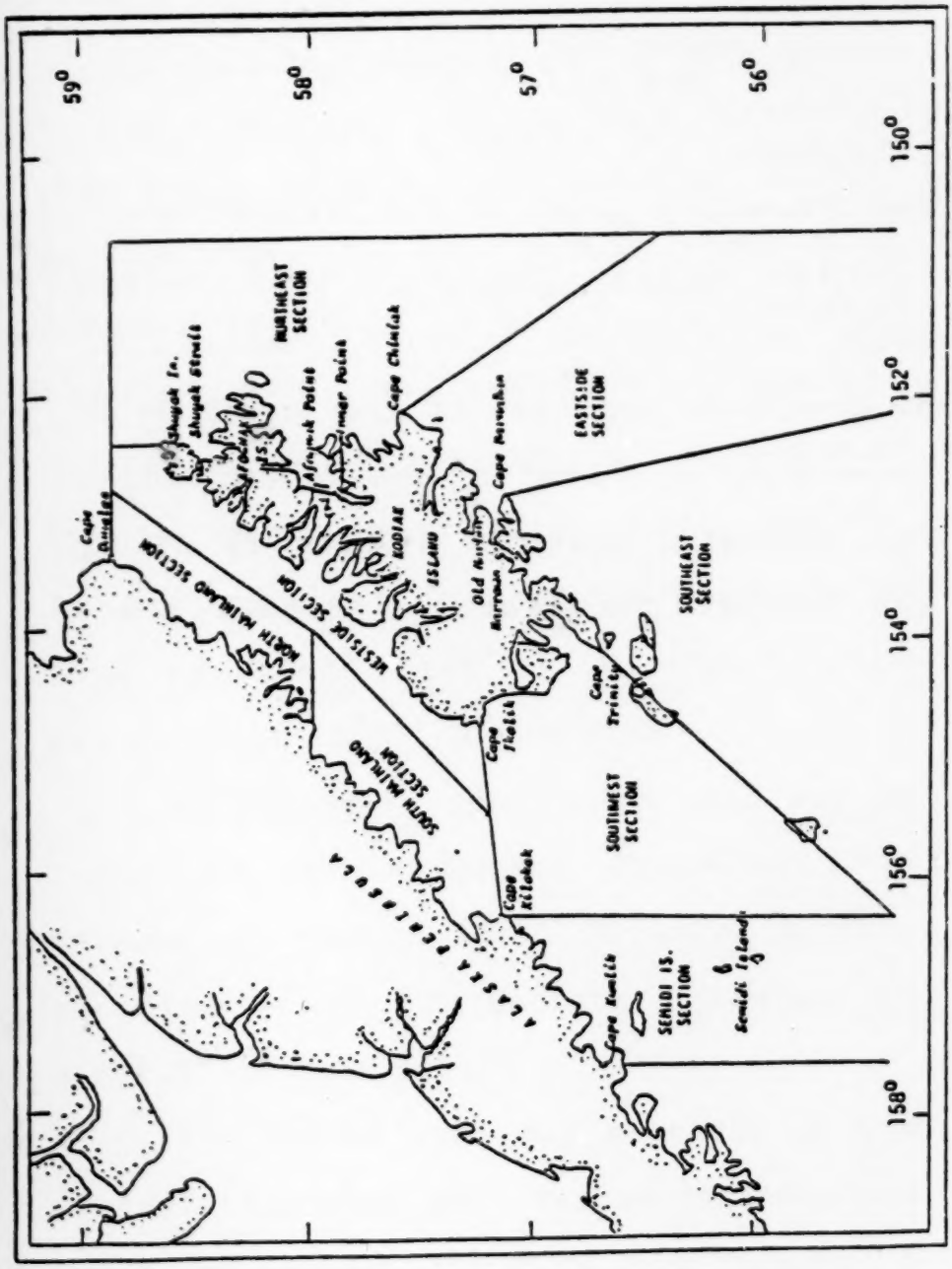
(ii) Tanner crab may be taken in the Central, Kamishak Bay, Barren Islands, and Outer and Eastern Districts from December 1 through May 31 only, subject to adjustment

by the Secretary pursuant to § 671.27 of this part.

(f) Registration Area J - (1) Districts. The following districts within registration area J are established:

(i) Kodiak District. All waters south of 58°51' N. latitude, west of 150° W. longitude and east of the longitude of Cape Kumlik (157°35' W. longitude). The following sections (figure 1) within the Kodiak district are established:

Figure 1. -- Designated Tanner crab fishing sections within the Kodiak district.



(a) Northeast Section. All waters northeast of a line extending 145T from the easternmost tip of Cape Chiniak (57°37' N. latitude, 152°10' W. longitude), east of a line from the northernmost tip on Inner Point (57°59' N. latitude, 152°47' W. longitude) to Afognak Point (57°59' N. Latitude, 152°47' W. longitude), east of 152°30' W. longitude in Shuyak Strait and east of the longitude of the northernmost tip of Shuyak Island (152°20' W. longitude), and south of 5851' N. latitude;

(B) Eastside Section. All waters southwest of a line extending 145° T from the easternmost tip of Cape Chiniak, northeast of a line extending 168° T from the easternmost tip of Cape Barnabas (53°09' N. latitude, 152°53' W.longtude) and Old Harbor Narrows east of 153° 16' W. longitude;

(C) Southeast Section. All waters southwest of a line extending 168° T from the easternmost tip of Cape Barnabas (53° latitude, 152°53' W. longitude) and east of a line extending 222° T from the southernmost tip of Cape Trinity 56°44'50" N. latitude, 154°08'30" W. longitude);

(D) Southwest Section. All waters west of a line extending 222° T from the southernmost tip of Cape Trinity (56°44'50" W. latitude, 154°08'30" W. longitude), south of a line from the westernmost tip of Cape Ikolik (57°17'15" N. latitude 154°47' W. longitude) to the southernmost tip of Cape Kilokak (54°11'15" N. latitude, 156°19' W. longitude) and east of the longitude of Cape Kilokak;

(E) Semidi Island Section. All waters west of the longitude of Cape Kilokak (156°19' W. longitude) and east of the longitude of Kape Kumlik (157°35' W. longitude);

(F) Westside Section. All waters north of a line from the westernmost tip of Cape Ikolik (57°17'15" N. latitude, 154°47' W. longitude), east of a line from 57°15' N. latitude, 155°30' W. longitude to 58° N. latitude, 54° W. longitude to 58°51' N. latitude, 152°45' W. longitude, west of a line from the northernmost tip of Inner Point to the southernmost tip of Afognak Point (57°59'30" N. latitude, 152°47'30W W. longitude), west of 152°30' W. longitude in Shuvak Strait and west of the longitude of the northermost tip of Shuyak Island (152°20' W. longitude), and south of 58°51' N. latitude;

(G) North Mainland Section. All waters north of 58° N. latitude, west of a line from 58°51' N. latitude, 152°45' W. longitude to 58° N. latitude, 154° W. longitude and south of 58°51' N. latitude; and

(H) South Mainland Section. All waters south to 58° N. latitude, west of line from 58° N. latitude, 154° W. longitude to 57°15' N. latitude, 155°30' W. longitude and north of a line from the southernmost tip of Cape Kilokak (57°11'15" N. latitude, 155° 30' W. longitude.

(ii) South Peninsula District. All waters east of the longitude of Scotch Cap Light (164°44'06" W. longitude) to west of a line connecting the following points:

(A) Kupreanof Point (55°34' N. latitude, 159°36' W. longitude).

(B) The easternmost point of Castle Rock (55°16'48" N. latitude, 159°29' W. longitude).

(C) The intersection of a line extending southeast (135° T from point (2) to 157°35' W. longitude).

(iii) Chignik District. All waters west of the longitude of Cape Kumlik (157°35' W. longitude) to east of a line connecting the following points:

(A) Kupreanof Point (55°34' N. latitude, 159°36' W. longitude).

(B) The easternmost point of Castle Rock (55°16'48" N. latitude, 159°29' W. longitude).

(C) The intersection of a line extending southeast (135° T from point (2) to 157°35' W. longitude).

(iv) Eastern Aleutian District: All waters of Registration Area J between the longitude of Scotch Cap light (164° 44'6" W. longitude) and 172° W. longitude and south of 54°36' N. latitude.

(v) Western Aleutian District: All waters of Registration Area J. west of 172° W. longitude and south of 54°36' N. latitude.

(vi) Bering Sea District: Bering Sea waters north of 54°36' N. latitude. The following subdistricts within the Bering Sea District are established.

(A) Southeastern Subdistrict: East of 168° W. longitude, and south of the latitude of Cape Newenham (58°39' N. latitude), and all Bristol Bay waters.

(B) Pribilof Subdistrict: West of 168° W. longitude and south of the latitude of Cape Newenham (58°39' N. latitude).

(C) Northern Subdistrict: North of the latitude of Cape Newenham (58°39' N. latitude). The following sections within the Northern Subdistrict are established:

(1) Nome section: All waters of Norton Sound between the longitude of Penny River and the longitude of Tophok Head.

(2) General section: All other waters of the northern subdistrict.

(2) Seasons. Subject to adjustment by the Secretary in accordance with § 671.27, Tanner crab may be taken in Registration Area J:

(i) In all sections of the Kodiak District from 12:00 noon February 10, through 12:00 noon April 30 only except that in the Semidi Island section Tanner crab may be taken from 12:00 noon February 10 through 12:00 noon May 15 only.

(ii) In the South Peninsula District from 12:00 noon February 10 through 12:00 noon May 15 only.

(iii) In the Chignik District from 12:00 noon February 10 through 12:00 noon May 15 only.

(iv) In the Eastern Aleutian District from 12:00 noon February 15 through 12:00 noon June 15 only.

(v) In the Western Aleutian District from 12:00 noon November 10 through 12:00 noon June 15 only.

(vi) In the Bering Sea District from 12:00 noon February 15 through through 12:00 noon June 15 only, except that Tanner crab other than C. bairdi may be taken or possessed from 12:00 noon February 15 until 12:00 noon August 1.

(3) Storage of gear. During any period when fishing for all species of Tanner crab is prohibited in the applicable area, Tanner crab pots may be stored in the water only if stored: (i) In the waters which are both west of 172° W. longitude and 30 fathoms (55 meters) or less in depth; or

(ii) In the Southeastern Subdistrict, in the waters which are bounded on the north by 58° N. latitude, on the south by 57° N. latitude, on the east by 164° W. longitude and on the west by 166° W. longitude.

[45 FR 72669, Nov. 3, 1980, as amended at 46 FR 57303-57305, Nov. 23, 1981; 46 FR

58700, Dec. 3, 1981; 47 FR 10044, Mar. 9, 1982; 48 FR 40729, Sept. 9, 1983; 49 FR 35780, Sept. 12, 1984]

EFFECTIVE DATE NOTE: At 49 FR 35780, Sept. 12, 1984, paragraph (a) of § 671.26 was revised effective October 7, 1984. For the convenience of the user, the superseded text appears below:

§ 671.26 Seasons, general gear restrictions,and registration areas.

(a) Season dates. All season dates in this section are inclusive. Time periods begin at 12:00 noon and end at 12:00 noon on the dates specified, based on local time zones, unless otherwise specified.

§ 671.27 Time and area closures.

(a) Field orders. (1) Field orders issued by the Secretary under this part shall include the following information:

(i) A description of the area to be opened or closed; (ii) the effective date and any termination date of such

opening or closure; and (iii) the reason for the opening or closure.

(2) No field order issued under this section shall be effective until:

(i) It is filed for publication with the FEDERAL REGISTER;

(ii) It has been posted and otherwise made available to the public, in accordance with procedures customarily used by the ADF and G for posting and publicizing of similar notices of closure for 48 hours prior to its effective dates; and

(iii) It has been broadcast, at those time intervals, channels and frequencies customarily used by the ADF and G to broadcast similar notices of closure, for 48 hours prior to its effective date.

(3) Field orders issued pursuant to this section shall remain in effect until the earlier of the following dates:

(i) Any expiration date stated in the field order; or (ii) the effective date of any field order which modifies, rescinds, or supersedes the intitial field order.

(b) In-season adjustments - (1) General. The Secretary may, following consultation with the ADF and G, adjust the opening and closing dates for the Federal registration areas, districts, subdistricts and sections specified in §671.26 of this part.

(2) Determinations. Any adjustment under this section shall be based on a determination by the Regional Director that (i) the condition of Tann crab stocks in any such geographic area is substantially different from the condition anticipated at the beginning of the fishing year, and (ii) such differences reasonably support the need for in-season conservation

measures to protect such Tanner crab stocks.

(3) Data. Fishery data reported in-season which relate to one or more of the following factors may be considered in making this determination:

(i) The effect of overall fishing effort within the area;

(ii) Catch per unit of effort and rate of harvest;

(iii) Relative abundance of Tanner crab within the area in comparison with pre-season prediction;

(iv) The proportion of immature or softshell Tanner crab being handled;

(v) General information on the condition of Tanner crab within the area; and

(vi) Any other factors relevant to the conservation and management of Tanner crab.

(4) Procedures. (i) The Secretary shall publish proposed adjustments in the FEDERAL REGISTER for public comment before they are made final, unless the Secretary finds for good cause that such advance notice and public procedure are impracticable, unnecessary, or contrary to the public interest.

(ii) If the Secretary decides, for good cause, that any in-season adjustment is to be made without affording a prior opportunity for public comment, public comments on the necessity for, and extent of, the adjustment will be received by the Regional Director for a period of 15 days after the effective date of the adjustment.

(iii) During any such 15-day period, the Regional Director shall make available for public inspection, during business hours, the aggregate data upon which the adjustment was based. (Address: National Marine Fisheries Service, Alaska Regional

Office, Federal Building, Room 453, 709 West Ninth Street, Juneau, Alaska 99802).

(iv) If comments are received during the 15-day period, the Secretary shall reconsider the necessity for the adjustment and, as soon as practicable after that reconsideration, shall either: (A) publish in the FEDERAL REGISTER a notice of continued effectiveness of the adjustment, responding to comments received; or (B) modify or rescind the adjustment.

(5) Notice of adjustments. The Regional Director shall give notice of in-season adjustments by issuance of field orders in accordance with the procedures in paragraph (a) of this section.

(c) Optimum yield. No action which has the effect of raising the optimum yield for Tanner crab in any geographic area as specified in Table 1 of § 671.21(a) is authorized under this section.

(d) Prohibition. Any fishing for Tanner crab contrary to a field order issued under this section is prohibited.

[45 FR 72669, Nov. 3, 1980, as amended at 47 FR 57305, Nov. 23, 1981]

APPENDIX G

ALASKA STATUTES

AS 16.05.475. Registration of fishing vessels.

(a) It is unlawful for any person to employ a fishing vessel in the water of Alsaka unless it is registered under the laws of the state. Vessels registered under the laws of another state, and persons residing in another state, are not excused from this provision.

(b) The term "employ", as used in this section, shall be defined by the Board of Fisheries through the adoption of regulations under the Administrative Procedure Act (AS 44.62). The definition may include any activities involving the use or navigation of fishing vessels.

(c) The term "registered under the laws of the state", as used in this section, shall be defined by the Board of Fisheries through the adoption of regulations under the Administrative Procedure

Act (AS 44.62). The definition may include any existing requirements regarding registration, licenses, permits, and similar matters imposed by law or regulation together with modification of them and with any additional requirements the board finds necessary to maximize the authority of the state to apply and enforce fisheries regulations under the Fishery Conservation and Management Act of 1976 (P.L. 94-265, 90 Stat. 331, 16 U.S.C. 1801 et seq.)

(d) The term "fishing vessel", as used in this section, means any vessel, boat, ship, or other craft which is used for, equipped to be used for, or of a type which is normally used for

(1) fishing, or

(2) aiding or assisting one or more vessels at sea in the performance of any activity relating to fishing, including, but not limited to, preparation, supply storage,

refrigeration, transportation, or processing. (§ 7 ch 105 SLA 1977)

AS 16.05.920. Certain acts made unlawful.

(a) Unless permitted by this chapter or by regulation made under this chapter, it is unlawful for a person to take, possess, transport, sell, offer to sell, purchase, or offer to purchase fish, game, or marine, aquatic plants, or any part of fish, game or aquatic plants, or a nest or egg of fish or game.

(b) No person may knowingly disturb, injure, or destroy a notice, signboard, seal, tag, aircraft, boat, vessel, automobile, paraphernalia, equipment, building or other improvement or property of the department used in the administration or enforcement of this chapter, or a poster or notice to the public concerning the provisions of this chapter, or a marker indicating the boundary of an area closed

to hunting, trapping, fishing, or other special use under this chapter. No person may knowingly destroy, remove, tamper with, or imitate a seal or tag issued or used by the department or attached under its authority to a skin, portion, or specimen of fish or game, or other article for the purpose of identification or authentication in accordance with this chapter or a regulation adopted under this chapter. (§ 28 art 1 ch 94 SLA 1959; am § 3 ch 110 SLA 1970)

. . . .

AS 16.05.720. Penalties.

(a) Except as modified by (c) of this section, a person who violates AS 16.05.480 - 16.05.690 or the regulations of the department pertaining to commercial fisheries is guilty of a misdemeanor and upon conviction is punishable by a fine of not more than $5,000, or by imprisonment for not more than one year, or by both.

(b) The court shall transmit the proceeds from all fines to the proper state officer for deposit in the general fund of the state.

(c) A person who is convicted of commercial fishing in closed waters, commercial fishing during a closed period or season, or commercial fishing with unlawful gear including but not limited to nets, pots, tackle, or other devices designed or employed to take fish commercially, is guilty of a misdemeanor and in addition to the penalty imposed under (a) of this section is punishable by a fine of not less than the gross value to the fisherman of the fish found on the vessel or at the fishing site at the time of the violation. Upon a third conviction of a person for a violation under this subsection, and in addition to the forfeiture provision in AS 16.05.710, the fine shall be not less than three times the gross

value to the fisherman of the fish found on the vessel or at the fishing site, or, if no fish are found on the vessel or at the fishing site, a fine of not more than $10,000 (§ 12 art III ch 94 SLA 1959; am § 24 ch 131 SLA 1960; am §§ 1, 2 ch 124 SLA 1947)

. . . .

AS 16.10.210. Unlawful sale or offer prohibited.

It is unlawful for a person to possess, purchase, offer to purchase, sell, or offer to sell in the state migratory fish or migratory shellfish taken on the high seas knowing that they were taken in violation of a regulation promulgated by the Board of Fisheries governing the taking of migratory fish or migratory shellfish in certain areas designated by the Board of Fisheries or the commissioner. (§ 4 ch 121 SLA 1960; am § 23 ch 206 SLA 1975)

APPENDIX H

ALASKA REGULATIONS

5 AAC 35.400. DESCRIPTION OF STATISTICAL AREA. Statistical area H has as its eastern boundary the longitude of Cape Fairfield (148°50' W. long.) and its southern boundry the latitude of Cape Douglas (58°52' N. lat.).

Authority: AS 16.05.251(a)(2)

. . . .

5 AAC 35.410. FISHING SEASONS. Male tanner crab may be taken (1) in the Southern district only from 12:00 noon November 1 through April 30;

(2) in the Central, Kamishak Bay, Barren Islands, Outer and Eastern districts only from 12:00 noon November 1 through May 31. (In effect before 1981; am 6/28/81, Reg 78; am 6/30/83, Reg. 86)

Authority: AS 16.05.251

. . . .

5 AAC 35.500. DESCRIPTION OF STATISTICAL area. Statistical Area J includes all Pacific Ocean waters south of the

latitude of Cape Douglas (58°52' N. lat.), west of the longitude of Cape Fairfield (148°50' W. long.) east of 172° E. long., and shoreward of the 400-fathom (732 m) depth contour and all Bearing [sic] Sea waters east of 172° E. long.

Authority: AS 16.05.251(a)(2)

. . . .

35 AAC 35.505. DESCRIPTION OF DISTRICTS. (a) Kodiak district: all waters south of the latitude of Cape Douglas (58°51' N. lat.), west of the longitude of Cape Fairfield (148°50' W. long.) and east of the longitude of Cape Kumlik (157°27' W. long);

(1) Northeast section: all waters northeast of a line extending 145° from the easternmost tip of Cape Chiniak, east of a line from the northernmost tip of Inner Point to the southernmost tip of Afognak Point, east of 152°30' W. long. in Shuyak Strait and east of the longitude

of the northernmost tip of Shuyak Island (152°20' W. long.);

(2) Eastside section: all waters southwest of a line extending 145° from the easternmost tip of Cape Chiniak, northeast of a line extending 168° from the easternmost tip of Cape Barnabas and Old Harbor Narrows east of 153°16' W. long;

(3) Southeast section: all waters southwest of a line extending 168° from the easternmost tip of Cape Barnabas and east of a line extending 222° from the southernmost tip of Cape Trinity:

(4) Southwest Section: all waters west of a line extending 222° from the southernmost tip of Cape Trinity, south of a line from the westernmost tip of Cape Ikolik to 57°15' N. lat., 155°30' W. long. to the southernmost tip of Cape Kilokak and east of the longitude of Cape Kilokak (156°19' W. long.);

(5) Semidi Island Section: all waters west of the longitude of Cape Kilokak (156°19' W. long.) and east of the longitude of Cape Kumlik (157°27' W. long.);

(6) Westside Section: all waters north of a line from the westernmost tip of Cape Ikokik, east of a line from 57°15' N. lat., 155°30'W. long to 58°N. lat., 154° W. long. to 58°51' N. lat., 152°45' W. long., west of a line from the northernmost tip of Inner Point to the southernmost tip of Afognak Island, west of 152°30w W. long. in Shuyak Strait, and west of the longitude of the northernmost tip of Shuyak Island (152°20' W. long.)

(7) North Mainland Section: all waters north of 58° N. lat. and west of a line from 58°51' N. lat., 152°45' W. long, to 58°N. lat., 154° W. long.;

(8) South Mainland Section: all waters south of 58° N. lat., west of a line from 58° N. lat., 154 ° W. long., to 57°5' N. lat., 155°30' W. long. and north of a line from the southernmost tip of Cape Kilokak to 57°15' N. lat., 155° 30' W. long.

. . . .

(In effect before 1982; am 7/25/82, Reg. 83; am 6/30/83, Reg. 86)

Authority: AS 16.05.251

5 ACC 35.510. FISHING SEASONS. Male tanner crab may be taken only as follows:

(1) in the Kodiak district, from 12:00 noon February 10 through 12:00 noon April 30, except in that portion of the Kodiak district from the longitude of Kilokak Rocks (156°20'13" W. long.) to the longitude of Cape Kumlik (156°27' W. long.) tanner crab may be taken only from 12:00 noon February 10 through May 15;

(2) in the Chignik district from 12:00 noon February 10 through 12:00 noon May 15;

(3) in the South Peninsula district, from 12:00 noon February 10 through 12:00 noon May 15;

(4) in the Eastern Aleutian district, from 12:00 noon February 15 through 12:00 noon June 15;

(5) In the Western Aleutian district from 12:00 noon November 10 through 12:00 noon June 15;

(6) In the Bering Sea district, from 12:00 noon February 15 through 12:00 noon June 15, except that male tanner crab other than Chionoecetes bairdi may be taken or possessed from 12:00 noon February 15 through 12:00 noon August 1. Tanner crab may be taken or possessed in the Norton Sound section of the Northern subdistrict. (Effective before 1981; am 6/28/81, Reg 78; am 7/25/82, Reg 83; am 6/30/83, Reg. 86)

Authority: AS 16.05.251

APPENDIX I

COOPERATIVE ENFORCEMENT AGREEMENT
BETWEEN THE GOVERNMENT OF
THE UNITED STATES
and
THE STATE OF ALASKA

PURSUANT TO THE
FISHERY CONSERVATION AND MANAGEMENT ACT
OF 1976
(26 U.S.C. 1801, et. seq.)

Whereas, the Fishery Conservation and Management Act of 1976 (FCMA) (Public Law 94-265, 16 U.S.C. 1801, et. seq.) as amended, established a Fishery Conservation Zone (FCZ) contiguous to the territorial sea;

Whereas, responsibility for implementation of fishery management plans (FMP's) developed under the authority of the FCMA for fisheries in the FCZ resides with the Secretary of Commerce;

Whereas, under Section 311 (16 U.S.C. 1861) of the FCMA, the Secretaries of Commerce and Transportation ("Secretaries") jointly are charged with the responsibility for enforcing the provisions of the lFCMA;

Whereas, it is the intent of Congress and the policy of the FCMA to make use of the affected states' resources, facilities, and expertise in the establishment and implementation of fishery management plans for the FCZ, and, to the extent possible, to manage individual and interrelated stocks of fish as a unit or in close coordination;

Whereas, the State possesses law enforcement personnel, vessels, aircraft, vehicles and other equipment and other capabilities presently engaged in enforcing state conservation laws which could be utilized in assisting the Secretaries in carrying out the law enforcement responsibilities mandated by the Act;

Whereas, the North Pacific Fishery Management Council (NPFMC) has recognized that the flexibility in the State's management program, which allows for rapid in-season adjustments in allowable catch, seasons,

and area closures in response to unanticipated adverse or favorable conditions of the fishery resources, is considered a substantial advancement in traditional fisheries management and has resolved, for conservation purposes, to incorporate in several of its management plans provisions which would allow in-season adjustments to be made by the Director, Alaska Region, of the National Marine Fisheries Service;

Recognizing that as FMP's developed by the NPFMC are implemented by Federal regulations, the United States Coast Guard and National Marine Fisheries Service will enforce the provisions of these regulations with respect to both foreign and domestic fishermen;

Recognizing that the State of Alaska has an extensive management, research, and enforcement program which has effectively managed the domestic commercial shellfish and finfish fisheries throughout their

range prior to the enactment of the FCMA; that the Division of Commercial Fisheries of the Alaska Department of Fish and Game has in place a staff of fisheries managers and research biologists with substantial experience and expertise in fisheries management; and that the State of Alaska has made a substantial investment in facilities, communications and information systems, vessels and other equipment which makes it possible to closely monitor the conduct of the fisheries, and recommend in-season management and adjustments as necessary, as well as facilitating both short- and long-term research projects; Therefore, it is consistent with the purposes and policy of the FCMA to conclude an agreement between the State and the United States that will provide for cooperation and full utilization of the resources of the State in accomplishing the purposes of the FCMA; and

The Governments of the United States and the State of Alaska do hereby enter into an agreement concerning implementation and enforcement of domestic fishery provisions of FMP's developed pursuant to the Fishery Conservation and Management Act of 1976.

I. IN-SEASON ADJUSTMENTS OF SEASONS AND AREAS

a. Alaska Department of Fish and Game (ADF&G) and the National Marine Fisheries Service, Alaska Region, (NMFS) mutually agree:

1. To work in close coordination to implement fishery management plans (FMP's) and those provisions within the plans which call for the use of field orders (FO's) to adjust, for purposes of conservation and management, season and area openings and closures in the FCZ; and

season and area openings and closures in the FCZ; and

2. To work in close coordination to implement emergency orders (EO's) which adjust season and area openings and closing affecting vessels and persons subject to State jurisdiction, where necessary to promote implementation of FMP's.

b. The ADF&G agrees:

1. To monitor the status of the fishery resources in-season and recommend to the Director, Alaska Region (hereinafter referred as "Regional Director") of the NMFS appropriate adjustments in season and area openings and closures for purposes of conservation and management.

In-season condition and status of the stocks, as well as rates of domestic harvest and total catch will be derived from fish tickets, registration reports, dockside sampling, research data, and other empirical observations of a real time basis. ADF&G fisheries management personnel will, based on available information, evaluate the status of the stocks and the fishery using the following criteria (which generally parallel those which govern the actions of the Regional Director when issuing FO's).

A. The effect of overall fishing effort within the registration area;

B. Catch per unit effort and rate of harvest;

C. The relative abundance of the fishery resource within the area in comparison with preseason expectations;

D. The proportion of immature or soft shell crab being handled;

E. General information on the condition of the fishery resource within the area;

F. The rate of harvest and total by-catch of non-target species;

H. Fishing practice mortality of juveniles of either target or non-target species;

I. Fishing practice mortality of non-target species;

J. Enforcement capability; or

K. Any other factors necessary for the conservation and management of the fishery resources.

2. That once an ADF&G management biologist has determined that conditions exist within a fishery which will, for conservation and management purposes, require the issuance of a FO, the following administration procedure shall be followed:

A. A draft FO shall be prepared under direction of the respective ADF&G regional office, following the procedure described in "Emergency Orders, Standards of General Application" (ADF&G, June 1976). This includes a detailed justification for

the proposed action. The text of the FO shall be transmitted to the Commissioner by the most expedient means possible.

B. During the drafting stage of the proposed FO, the Regional Director shall be notified by telephone of the area, time and reason for the proposed opening or closure.

C. The Commissioner, or his designee, shall 1) analyze the proposal and justification and 2) if he agrees with the proposed FO, forward the draft document to the Regional Director with his recommendations by the most expedient means possible.

3. That, in the event the Commissioner determines there is the necessity of issuing an EO for a fishery in the territorial waters, without the need to issue a complementary FO, he shall notify the Regional Director of the proposed action and the intended date for implementation if implementation of the EO could affect the fishery in the FCZ.

c. The NMFS agrees that:

1. Upon receipt of a recommended FO/EO from the Commissioner, the Regional Director will log receipt of the proposal;

2. If the Regional Director disapproves the draft FO, he will notify the Commissioner immediately, stating the reason for disapproval;

3. If the Regional Director intends to approve the action, he will so notify the Commissioner and the Assistant Administrator for Fisheries, NOAA, and will publish a proposed FO in the Federal Register for public comment before it is made final, unless the Regional Director finds for good cause that such notice and public comment can be waived as being impracticable, unnecessary, or contrary to the public interest.

4. If the Regional Director decides, for good cause, that a final FO is to be issued without affording a prior opportunity for public comment, public comments on the necessity for, and the extent of,

the FO shall be received by the Regional Director for a period of 15 days after the effective date of the field order.

A. During any such 15 day period, the Regional Director shall make available for public inspection, during business hours, the aggregate data upon which an adjustment was based.

B. If comments are received during the 15 day period the Regional Director shall reconsider the necessity for the FO and, as soon as practicable after that reconsideration, shall publish in the Federal Register either (a) a notice of continued effectiveness of the adjustment,

responding to comments received; or (b) a modification or rescission of the adjustment after so notifying the ADF&G.

5. A final FO issued by the Regional Director, following either receipt of public comment or a determination to waive public comment, shall include the following information:

   A. A description of the area to be opened or closed;

   B. The effective date and any termination date of such opening or closure; and

   C. The reason for the opening or closure.

6. A final FO does not become effective until:

A. It is filed for publication in the Federal Register;

B. It has been posted and otherwise made available to the public, in accordance with procedures customarily used by the ADF&G for the posting and publicizing of similar notices of closure, for a period of time specified in regulations implementing the FMP; and

C. It has been broadcast at those time intervals, channels and frequencies customarily used by the ADF&G to broadcast similar notices of closure, for a period of time specified in regulations implementing the FMP.

8. In the event the Regional Director unilaterally initiates a FO, outside of the procedure outlined above, he shall notify the Commissioner immediately of the proposed action and the date for implementation.

9. Factors which the Regional Director may take into consideration in approving a recommended FO are set forth in the regulations implementing the fishery management plan for the fishery concerned.

d. Term: This section (I) of this Agreement shall be effective as of the date this Agreement is signed by NMFS and the ADF&G, and shall remain in effect until terminated by either Party, giving the other Party written notice, in which event, it shall terminate on the

day immediately following the thirtieth day of such notice.

e. Amendment: This section (I) of this Agreement may be amended with the mutual consent of the NMFS and the ADF&G. The Regional Director shall notify the other parties to this Agreement of any amendments effected pursuant to this section.

II. PERMIT ISSUANCE (Reserved)

This section (II) of this Agreement is reversed. It will be added by amendment of the Agreement with the mutual consent of the NMFS, ADF&G, United States Coast Guard (USCG), and the Alaska Commercial Fisheries Entry Commission (CFEC).

III. REPORTING, DATA COLLECTION AND STORAGE

A. The NMFS and ADF&G mutually agree:

1. To cooperate in reporting fish harvest in waters off Alaska and in the collection and storage of pertinent data for the purposes of effective administration of regulations implementing fishery management plans;
2. That, for the purposes of collection and storage of data required by Federal regulations, ADF&G agents shall be considered as agents of the Federal Government and subject to the confidentiality provisions of 16 U.S.C. 1853(d) and 18 U.S.C. 1905; and
3. That the collection, storage and release of such domestic catch data by the ADF&G will

conform to federal confidentiality requirements of the Act and other applicable law.

b. The ADF&G agrees to:

1. Require processors and fish buyers to submit fish ticket data to ADF&G at lease once a week or as otherwise specified by ADF&G for each particular area and fishery;

2. Develop the capability of collecting and storing all data generated by fish ticket reporting requirements listed in FMP's;

3. Develop the capabilities of providing a hard copy report of domestic fish catches for each species by INPFC management area;

4. Submit to the Regional Director the report described in number three (3) above, monthly;

5. Establish and maintain procedures for preserving the confidentiality of data collected under this Agreement; and

6. Provide the Regional Director with a description of the procedures specified in the above paragraph so that their effectiveness may be determined and evaluated and to make any reasonable changes in such procedures as may be requested by the Regional Director.

c. The NMFS agrees to:

1. Provide to the Commissioner, ADF&G, weekly aggregate catch reports of foreign fisheries

that are covered by FMP's and PMP's;

2. Provide to the Commissioner, ADF&G, a current identification of data to be collected by the State under the authority of this Agreement and regulations implementing FMP's;

3. Provide to the Commissioner, ADF&G, a list of authorized individuals to whom the State may disclose Federal data collected and stored under this Agreement.

4. Be responsible for obtaining all Federal Reports Act clearances for the collection of any data collected under authority of the FCMA.

d. Term: This section (III) of this Agreement shall be effective as of

the date the Agreement is signed by NMFS and the ADF&G, and shall remain in effect until terminated by either Party, giving the other Party written notice, in which event it shall terminate on the day immediately following the thirtieth day of such notice.

IV. LAW ENFORCEMENT

a. The ADF&G, Alaska Department of Public Safety (ADPS), NMFS, and USCG mutually agree to work in close coordination and cooperation to enforce Federal and State regulations implementing fishery management plans. Nothing in this agreement shall be interpreted to affect the authority of each agency to make the final determination within its priorities regarding utilization of its personnel, services, and equipment.

b. The ADF&G and ADPS agree that:

1. Those law enforcement officers (hereafter referred to as Officers) who are members of ADPS and ADF&G and who have been designated under 16 U.S.C. 1861(b), may enforce those provisions of the FCMA and 50 C.F.R. 670-679 that apply to fishing vessels of the United States (as defined in the Act), in accordance with any guidelines or limitations as the Secretaries or their designees may, from time to time, impose.

2. All Officers, while acting as Federal law enforcement agents, with respect to fishing vessels of the United States may:

A. With or without a warrant or other process:

(i) arrest any person, if he has reasonable cause to believe that such person has committed an act prohibited by section 307(1)(D), (E), (F), and (H) of the FCMA;

(ii) board, and search or inspect, any U.S. vessel which is subject to the provisions of the FCMA;

(iii) seize any U.S. vessel (together with its fishing gear, furniture, appurtenances, stores, cargo) used or employed, or with respect to which it reasonably appears

that such vessel was used or employed in, the violation of any provision of the FCMA or regulations;

(iv) seize any fish (wherever found) taken or retained in violation of any provision of the FCMA or regulations; and

(v) seize any other evidence related to any violation of any provision of the FCMA or regulations;

B. Execute any warrant or other process, issued by any court of competent jurisdiction; and

C. Exercise any other lawful authority;

3. All Officers, while acting as Federal law enforcement agents, shall possess the powers and authorities as set forth above but shall not be held or considered as employees of the United States for the purposes of any laws administered by the United States Civil Service Commission and shall not be salaried by the United States for any services performed;

4. The State shall provide to the NOAA Office of General Counsel, Jueeau, information with respect to any investigative reports pursuant to section 311 of the FCMA (16 U.S.C. 1861(b));

5. Officers who for any reason leave or are removed from service as members of the ADPS of ADF&G will be simultaneously divested of authority herein conferred.

c. The NMFS agrees that:

1. Its Special Agents who are deputized as State of Alaska Peace Officers are hereby authorized to enforce State of Alaska fishing laws and regulations which implement or complement NPFMC management plans;

2. Its Special Agents, while acting as State Peace Officers, shall possess the powers and authorities of State Peace Officers but shall not be held or considered as employees of

the State of Alaska for the purposes of personnel laws administered by the State and shall not be salaried by the State for any services performed.

3. Its agents shall provide to the State of Alaska, Department of Law, information with respect to any investigative reports that may be initiated pursuant to State law;

4. Its Special Agents who for any reason leave or are removed from service of the NMFS will be simultaneously divested of authority herein contained.

d. The USCG agrees that:

1. ADPS and ADF&G Officers will be permitted to accompany any USCG vessel or aircraft on law

enforcement patrols providing that space is available;

2. On request from ADPS and/or ADF&G for assistance in any State of Alaska fishery law enforcement situation, the USCG will provide transportation and backup assistance, if USCG resources are available;
3. It shall, in a timely manner, provide to the NMFS and the ADPS and/or ADF&G data and information with respect to activities under this Agreement and any enforcement actions that have been taken.

e. Term: This section (IV) of this Agreement shall be effective as of the date the Agreement is signed by the NMFS, USCG, ADPS and ADF&G, and

shall remain in effect until terminated by any Party, giving the other Parties written notice, in which event it shall terminate of the day immediately following the thirtieth day of such notice.

f. Amendment: This section (IV) of this Agreement may be amended with the mutual consent of the NMFS, ADF&G, USCG and ADPS. The Regional Director shall notify the other parties to this Agreement of any amendments made pursuant to this section.

V. AUTHORITY

a. State: AS 16.05.251, AS 16.05.270, AS 16.05.060, AS 16.05.150 et. seq., AS 18.65, AS 44.62, AS 16.05.050, AS 16.05.020.

b. Federal: 16 U.S.C. §§ 1801, 1851(a)(7), 1855(g), and 1861(a).

VI. OTHER PROVISIONS

a. This Agreement shall be construed to be consistent with the FCMA, including the definitions of terms in the Act, and regulations promulgated pursuant thereto.

b. Nothing herein is intended to conflict with current Federal or State of Alaska statutory authorities or directives. If the terms of this Agreement are inconsistent with existing directives of any of the agencies entering into this Agreement, then those portions of this Agreement which are determined to be inconsistent shall be invalid as to that party; but the remaining terms and conditions of this Agreement not affected by any

inconsistency shall remain in full force and effect.

c. At the first opportunity for review of the Agreement, such changes as are deemed necessary will be accomplished by either an amendment to this Agreement or by entering into a new agreement, whichever is deemed expedient to the interests of the concerned parties.

d. Nothing in this Agreement shall be construed as a waiver or admission regarding any claim of the respective parties regarding their authority or jurisdiction under the FCMA or any other applicable law.

APPROVED:

FOR THE UNITED STATES

s/ Date: 12/20/78
Director, Alaska Region
National Marine Fisheries
Service

s/ Date: 12/20/78
Commander, 17th Coast Guard District
U.S. Coast Guard

FOR THE STATE

s/ Date: 20 Dec.78
Commissioner
Alaska Department of Fish and Game

s/ Date: 12/20/78
Chairman
Alaska Commercial Fisheries Entry
Commission

s/ Date: 12-20-78
Commissioner
Alaska Department of Public Safety

Supreme Court, U.S.
FILED
NOV 1 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-342

IN THE
Supreme Court of the United States

October Term, 1985

THEODORE PAINTER, JR.,
Appellant,

v.

STATE OF ALASKA,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF ALASKA

MOTION TO DISMISS OR AFFIRM

HAROLD M. BROWN
ATTORNEY GENERAL

SARAH ELIZABETH MCCRACKEN
ASSISTANT ATTORNEY GENERAL
(Counsel of Record)

State of Alaska
Office of the Attorney General
1031 W. 4th Avenue, Suite 200
Anchorage, Alaska 99501
(907) 276-3550

Counsel for Appellee

BEST AVAILABLE COPY

aBCD Legal Printers, Seattle, Washington

59 P

TABLE OF CONTENTS

Page

Statement of the Case 1

1. Background 2
2. Statement of Facts 3
3. Statement of Proceedings 4

Reasons Why the Appeal Should be Dismissed 5

Summary of Argument 5

1. Review of the Alaska Court's Interlocutory Order Is Not Within This Court's Narrow "Collateral Order" Exception To The Finality Requirement . . . 5
2. The Issue Presented Does Not Merit This Court's Attention 9
   - A. The Magnuson Act Recognizes and Provides for Continued State Fisheries Management Beyond Territorial Waters 9
   - B. Mere Adoption of a Tanner Crab Fisheries Management Plan Does Not Trigger Federal Preemption 10
   - C. Continued State Enforcement of Consistent State Regulations Furthers the Purposes and Policies of the Magnuson Act 17

Conclusion 18

Appendices:

Appendix A - Alaska Tanner Crab Regulations A-1
Appendix B - State Criminal Complaint B-1
Appendix C - Alaska Statutes C-1
Appendix D - Alaska Court Rules D-1
Appendix E - Order of the Alaska Supreme Court . . E-1
Appendix F - NOAA General Counsel Opinion No. 93 . . . . . F-1

TABLE OF AUTHORITIES

Cases	Page
Anderson Seafoods, Inc. v. Graham, 529 F. Supp. 512 (D. Fla. 1982)	8
Andrews v. Virginian Railway Co., 248 U.S. 272 (1919)	7
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)	5,6
Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978)	6
Fidelity Federal Savings and Loan Association v. De La Cuesta, 458 U.S. 141 (1982)	11,13
Flanagan v. United States, 465 U.S. 259 (1984)	6
Florida v. Baldrige, No. 83-7071 Civ. (N.D. Fla., *dismissed* Jan. 8, 1985)	8
Florida v. Baldrige, No. 83-7380 Civ. (N.D. Fla., *dismissed* Jan. 8, 1985)	8
Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963)	11
Flynt v. Ohio, 451 U.S. 619 (1981)	7
F/V American Eagle v. State, 620 P.2d 657 (Alaska 1980), *appeal dismissed*, 454 U.S. 1130 (1981)	7,17
Hillsborough County v. Automated Medical Laboratories, Inc., 105 S. Ct. 2371 (1985)	11
Livings v. Davis, 465 So. 2d 507 (Fla. 1985)	8,10,12
Matthews v. Huwe, 269 U.S. 262 (1925)	7
Mercantile National Bank v. Langdeau, 371 U.S. 555 (1963)	8
People v. Weeren, 607 P.2d 1279 (Cal. 1980), *cert. denied*, 449 U.S. 839 (1980)	7,8,10
Richardson-Merrell, Inc. v. Koller, 105 S. Ct. 2757 (1985)	6

TABLE OF AUTHORITIES, cont.

Cases *Page*

Roche v. Evaporated Milk Association, 319 U.S. 21 (1943) 6

Skiriotes v. Florida, 313 U.S. 69 (1941) 5,7,9, 10,13,14,*passim*

Southeastern Fisheries v. Livings, No. 83-524 Civ. (S.D. Fla. Jan. 4, 1985) 8

State v. Bundrant, 546 P.2d 530 (Alaska 1976), *appeal dismissed sub nom. Uri v. Alaska*, 429 U.S. 806 (1976) 2,7,17

State v. F/V Baranof, 677 P.2d 1245 (Alaska 1984), *cert. denied*, 105 S. Ct. 98 (1984) 8,10,11,12,*passim*

State v. Millington, 377 So. 2d 685 (Fla. 1979) 8

State v. Painter, 695 P.2d 241 (Alaska Ct. App. 1985) . . 2, 3,4

State v. Southeastrn Fisheries Association, 415 So. 2d 1326 (Fla. Ct. App. 1982) 8

State v. Sterling, 448 A.2d 785 (R.I. 1982) 8

United States Statutes

16 U.S.C. § 1801(b) 18
16 U.S.C. § 1812 12
16 U.S.C. § 1852(h) 2
16 U.S.C. § 1854 12
16 U.S.C. § 1856(a) 7,10,11,12,13,*passim*
28 U.S.C. § 1257 1,5,6

TABLE OF AUTHORITIES, cont.

Alaska Statutes

page

AS 16.05.060 3
AS 16.05.475 3
AS 16.05.720(a) 4
AS 22.05.010(d) 7
AS 22.07.030 4,7

Federal Regulations

50 C.F.R. §§ 671.1–.27 (1983) 2
50 C.F.R. § 671.1 (1983) 12
50 C.F.R. § 671.2 (1983) 3
50 C.F.R. § 671.26(f) (1983) 3
50 C.F.R. § 671.27 (1983) 3

Alaska Regulations

5 AAC 35.001–.640 (1983) 2
5 AAC 35.505(a) (1983) 3
5 AAC 35.510(1) (1983) 2,4

Court Rules

Alaska Rule of Appellate Procedure 301 4
Alaska Rule of Appellate Procedure 302 7
Alaska Rule of Appellate Procedure 304 4
Alaska Rule of Criminal Procedure 43(a) 4

TABLE OF AUTHORITIES, cont.

Other Authorities *Page*

United States Constitution, article II, clause 2 10

43 Fed. Reg. 21,174-251 (1978) 2

43 Fed. Reg. 21,175 (1978) 2

43 Fed. Reg. 21,197 (1978) 2

43 Fed. Reg. 21,199 (1978) 2

43 Fed. Reg. 21,200 (1978) 3,11

H.R. 200 14

S. 961 12,14,16

Committee on Commerce and National Ocean Policy Study, 94th Cong., 2d Sess., *A Legislative History of the Fishery Conservation and Management Act of 1976* 9,10,12,14,*passim*

Cooperative Enforcement Agreement Between the Government of the United States and the State of Alaska, Dec. 10, 1978 3,13

J. McBride, "Tanner Crab Development and Tagging Experiments 1978-1982," in *Proceedings of the International Symposium on the Genus Chionecocetes* (Univ. of Alaska 1982, Sea Grant Report No. 82-10) . . . 2

NOAA General Counsel Op. No. 93 (Jan. 19, 1981) 13

No. 85-342

IN THE
Supreme Court of the United States

October Term, 1985

THEODORE PAINTER, JR.,
Appellant,

v.

STATE OF ALASKA,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF ALASKA

MOTION TO DISMISS OR AFFIRM

Appellee, the State of Alaska, respectfully moves to dismiss the above-entitled case or, alternatively, to affirm the decision of the Alaska Court of Appeals, on the grounds that the appeal is not a final judgment under 28 U.S.C. § 1257 and that this case does not present a substantial federal question.

STATEMENT OF THE CASE

1. Background.

This appeal involves a jurisdictional challenge to enforcement of Alaska's Tanner crab management and conservation regulations beyond the state's three-mile territorial sea. Tanner crab, like king crab, migrate freely across

Alaska's territorial sea boundary during their life cycle.[1] Alaska has exercised management authority over, and has adopted regulations governing the harvest of, Tanner crab in and beyond its territorial sea since the Tanner crab fishery first developed in the late 1960's. *See* 43 Fed. Reg. 21,199 (1978).

Until 1978 there were no federal regulations governing management of the domestic Tanner crab fishery. In 1978, the North Pacific Fisheries Management Council ("NPFMC") adopted a fishery management plan ("FMP") under section 302(h) of the Magnuson Fishery Conservation and Management Act ("MFCMA" or "Magnuson Act"), 16 U.S.C. § 1852(h).[2] The federal regulations implementing the FMP at the time this case arose, 50 C.F.R. §§ 671.1--.27 (1983), were (and still are) substantially identical to state Tanner crab regulations, 5 AAC 35.001--.640 (1983).[3]

---

[1] *See* discussion of king crab biology in *State v. Bundrant*, 546 P.2d 530, 551 (Alaska 1976), *appeal dismissed sub nom. Uri v. Alaska*, 429 U.S. 806 (1976); for discussion of Tanner crab biology and migratory characteristics, *see* 43 Fed. Reg. 21,197 (1978); *see also* J. McBride, "Tanner Crab Development and Tagging Experiments 1978-1982," in Proceedings of the Int'l Symp. on the Genus *Chionoecetes* (Univ. of Alaska 1982, Sea Grant Rep. No. 82-10) at 394.

[2] Provisions of the MFCMA are set out at Appendix E to Painter's Jurisdictional Statement. The FMP was approved by the Secretary of Commerce on April 18, 1978, and was first published at 43 Fed. Reg. 21,174-251 (1978).

[3] The FMP expressly proposed that the Secretary of Commerce adopt "relevant Alaska statutes and regulations currently in force." 43 Fed. Reg. 21,175 (1978). The trial court in this case specifically found that the state and federal Tanner crab regulations were "substantially the same." *State v. Painter*, 695 P.2d 241, 242 (Alaska Ct. App. 1985). The pertinent state regulations are reprinted for the Court's convenience in Appendix A hereto; copies of pertinent federal regulations are included in Appendix F to Painter's Jurisdictional Statement.

2. Statement of Facts.

On November 17, 1983, state fish and wildlife protection officers observed the F/V Alaska Trojan, a 94-foot steel-hulled crab fishing vessel, fishing Tanner crab pots approximately 2.2 miles inside the closed waters of the Kodiak Tanner crab district, approximately six miles beyond the state's three-mile territorial sea.[4] The F/V Alaska Trojan was registered in the State of Alaska under AS 16.05.475 and was skippered by Theodore Painter, Jr., an Alaska resident.[5] The Kodiak Tanner crab district was not open to commercial fishing until February 10, 1984, nearly three months after the date of the offense. 5 AAC 35.510(1) (1983) (Appendix A-7) and 50 C.F.R. § 671.26(f)(2)(i) (1983) (Appendix F-53 to Painter's Jurisdictional Statement).

As a result of a valid search warrant executed on December 8, 1983, the state obtained vessel log data that disclosed that the F/V Alaska Trojan had harvested approximately 11,304 pounds of Tanner crab in closed waters off Cape Douglas in November and December 1983, and that the vessel had harvested approximately 1,285 Tanner crab off Narrow Cape, Kodiak Island, in April 1981, after the season had been closed by state emergency order.[6] On January 10,

---

[4] The officers were patrolling by aircraft the closed waters line off Cape Douglas, between Kodiak Island and the mainland Alaska Peninsula. The line is described in 5 AAC 35.505(a) (Appendix A-4) and 50 C.F.R. §§ 671.2 and 671.26(f). (Appendix F-7 and F-45 to Painter's Jurisdictional Statement). *See* Appendix B hereto for copy of state's complaint.

[5] *State v. Painter*, 695 P.2d 241, 242 (Alaska Ct. App. 1985); *see also* Appendix B (complaint), and Appendix C (pertinent state statutes).

[6] *See* Appendix B for copy of complaint. State officials of the Department of Fish and Game issue in-season emergency field orders under AS 16.05.060 (Appendix C); federal officials issue similar emergency orders under 50 C.F.R. § 671.27 (Appendix F-55--F-61 to Jurisdictional Statement). Federal field orders are issued in conjunction with the state, as required by 50 C.F.R. § 671.27(b); *see also* Cooperative Enforcement Agreement, n. 13 *infra*, at I-5--I-6; discussion of state-federal cooperation in Tanner crab FMP at 43 Fed. Reg. 21,200 (1978).

1984, the State of Alaska charged the vessel's captain, Theodore Painter, Jr., with six counts of illegal Tanner crab fishing under 5 AAC 35.510(1) (1983) (Appendices A-7 and B).[7] The violations are all misdemeanors for which the maximum penalty is a $5000 fine or imprisonment for not more than one year, or both. AS 16.05.720(a) (Appendix C-3).

3. Statement of Proceedings.

A magistrate (sitting as a state district court judge) in Kodiak, Alaska, granted Painter's motion to dismiss the complaint on grounds that the state lacked jurisdiction over the offenses because they occurred in the three-to-two-hundred-mile fishery conservation zone ("FCZ"). *State v. Painter,* 695 P.2d 241, 242 (Alaska Ct. App. 1985). On appeal, the Alaska Court of Appeals unanimously reversed, holding that, absent any conflict between state and federal Tanner crab regulations, state regulations (as they apply to state-registered vessels) are not preempted by the MFCMA. *Id.* The court of appeals remanded the case to the district court for trial. *Id.* at 243.

Thereafter, Painter filed a petition for hearing in the Alaska Supreme Court, seeking that court's interlocutory review.[8] On May 28, 1985, the Alaska Supreme Court denied Painter's petition without ruling on the merits. *See* Appendix B-1 to Painter's Jurisdictional Statement. On June 7, 1985, Painter unsuccessfully asked the Alaska Supreme Court to

---

[7] Painter was not taken into custody nor required to post bail. Also, since this appeal arose, the Kodiak District Attorney dismissed the 1981 violation charges under Alaska Rule of Criminal Procedure 43(a), which provides for discretionary prosecutorial dismissal. (Appendix D-5).

[8] Alaska Rules of Appellate Procedure 301 and 304, and AS 22.07.030 provide for discretionary review of a decision of the court of appeals. The Alaska Supreme Court may summarily reject the petition, or may grant the petition and set the matter on the calendar for full briefing and oral argument. *See* Alaska Rule of Appellate Procedure 304 (Appendix D-3).

stay the remand. On July 25, the court denied Painter's request for reconsideration of its order denying the stay. (Appendix E).

REASONS WHY THE APPEAL SHOULD BE DISMISSED

Summary of Argument

The interlocutory decision Painter presents to this Court is not a final decision and is not within the narrow "collateral order" exception to the finality requirement of 28 U.S.C. § 1257. The decision to remand the case for trial has no "final and irreparable effect" on the parties, *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545 (1949), and thus fails to meet the jurisdictional prerequisites established by this Court.

Furthermore, the issue raised by Painter is not a substantial federal question requiring interlocutory review. The Alaska Court of Appeals carefully considered Painter's arguments and correctly decided that Alaska has jurisdiction to prosecute this action for violations of state Tanner crab conservation regulations in the FCZ.

The Alaska Court of Appeals' decision is in harmony with *Skiriotes v. Florida*, 313 U.S. 69 (1941), and follows a long line of cases that affirm the states' authority to regulate their valuable fishery resources both within and outside the traditional three-mile state territorial sea.

1. Review of the Alaska Court's Interlocutory Order Is Not Within This Court's Narrow "Collateral Order" Exception To the Finality Requirement.

Painter asks this Court to review an interlocutory ruling of the Alaska Court of Appeals that reversed the trial court's dismissal of charges for lack of jurisdiction and remanded the case for trial. The decision thus is not "final" under 28 U.S.C.

§ 1257. Painter relies on that narrow exception to the finality requirement which has allowed review of certain important, independent "collateral issues." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). However, Painter raises issues that are neither unreviewable after trial nor of sufficient importance to merit interlocutory review.

As the *Cohen* Court held, the purpose of the finality requirement is "to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results." *Id.* at 546. Accordingly, the class of cases that merit interlocutory review is small. *Id.* at 545. Only where the decision has a "final and irreparable effect on the rights of the parties" will review be granted. *Id.* This Court, in *Richardson-Merrell, Inc. v. Koller,* 105 S. Ct. 2757 (1985), recently re-emphasized the need to limit the collateral order exception to "trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal." *Id.* at 2761.

To fall within the collateral order exception, an order must, at a minimum: (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action; and (3) be effectively unreviewable on appeal from a final judgment. *Id.* (citing *Coopers & Lybrand v. Livesay,* 437 U.S. 463 (1978)). Generally, the order must meet all three criteria. In a criminal case, this test is applied with the "utmost strictness," to avoid delays in resolution of the matter and because pretrial appellate review of criminal law issues is ordinarily inappropriate. *Flanagan v. United States,* 465 U.S. 259, 265 (1984); *Roche v. Evaporated Milk Association,* 319 U.S. 21 (1943) (no pretrial review of order denying motion to dismiss indictment for lack of jurisdiction).

Painter's appeal does not meet any of the "collateral order" criteria articulated above. First, Painter erroneously asserts that the Alaska Court of Appeals' decision is "not subject to further review in Alaska state courts." Jurisdictional Statement at 4. Assuming that Painter is convicted of the offenses at trial, he has a right to petition the Alaska

Supreme Court for discretionary review of the issue presented here. AS 22.07.030; AS 22.05.010(d); Alaska Rule of Appellate Procedure 302 (Appendices C-4 and D-1). That the Alaska Supreme Court's review is discretionary, rather than a matter of right, does not affect this Court's determination of whether the decision below is "final" in the sense of conclusively determining the issue and being effectively unreviewable on appeal from a final judgment. *See Andrews v. Virginian Railway Co.*, 248 U.S. 272, 275 (1919); *see also Flynt v. Ohio*, 451 U.S. 619, 621 (1981); *Matthews v. Huwe*, 269 U.S. 262, 265 (1925). Thus Painter fails to meet the first collateral order criterion (conclusive determination of the issue); therefore the appeal should be dismissed on this ground alone.

Second, the issue raised by Painter is not of such importance or national significance as to require interlocutory review, as discussed more fully in section 2 below. The Alaska Court of Appeals carefully considered and rejected Painter's preemption arguments and correctly found that section 1856(a) of the MFCMA expressly authorizes continued state jurisdiction over state-registered vessels, so long as state and federal regulations do not conflict. The court of appeals' decision is fully consistent with the MFCMA and its legislative history, with the position consistently taken by the Secretary of Commerce, with this Court's *Skiriotes* decision, and with a long line of state court decisions affirming the states' *Skiriotes* jurisdiction.[9] The opinion below is also consistent with decisions of those state and federal courts that have ruled specifically on the MFCMA, and there is no conflict

---

[9] *See F/V American Eagle v. State*, 620 P.2d 657 (Alaska 1980), *appeal dismissed*, 454 U.S. 1130 (1981); *State v. Bundrant*, 546 P.2d 530 (Alaska 1976), *appeal dismissed sub nom. Uri v. Alaska*, 429 U.S. 806 (1976); *People v. Weeren*, 607 P.2d 1279 (Cal. 1980), *cert. denied*, 449 U.S. 839 (1980).

in decisions regarding state jurisdiction in the FCZ so as to necessitate this Court's review.[10]

Given the insubstantial claims of error raised by Painter and the relatively small inconvenience to Painter of proceeding to trial, there simply is no "irreparable effect" on Painter's rights so as to meet the second criterion for the "collateral order" exception to the final judgment requirement (i.e., important issue separate from the merits). This case does not present the specter of long and complex litigation that might otherwise be avoided (typical of collateral order cases), such as liquidation of national banks, involving over 143 parties, presented in *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963), cited by Painter. This is a straightforward criminal case against one individual, involving crabbing violations by one vessel. Moreover, because of the possibility that Painter could be acquitted at trial, or that if convicted, the Alaska

---

[10] *See Anderson Seafoods, Inc. v. Graham*, 529 F. Supp. 512 (D. Fla. 1983) (upholding state enforcement in the FCZ of a state prohibition against use of purse seines); *State v. F/V Baranof*, 677 P.2d 1245 (Alaska 1984), *cert. denied*, 105 S. Ct. 98 (1984) (upholding enforcement of Alaska's king crab regulations in the FCZ); *Livings v. Davis*, 465 So. 2d 507 (Fla. 1985) (recognizing Florida's authority to enforce nonconflicting regulations in the FCZ against state-registered vessels); *People v. Weeren*, 607 P.2d 1279 (Cal. 1980), *cert. denied*, 449 U.S. 839 (1980) (affirming extraterritorial enforcement of California's swordfish management regulations); *State v. Southeastern Fisheries Ass'n*, 415 So. 2d 1326 (Fla. Ct. App. 1982) (affirming extraterritorial enforcement of a Florida prohibition on traps for catching saltwater finfish); *State v. Millington*, 377 So. 2d 685 (Fla. 1979) (upholding Florida landing law on minimum shrimp size); *State v. Sterling*, 448 A.2d 785 (R.I. 1982) (recognizing the authority of states to regulate fisheries in the FCZ, but finding a direct conflict between Rhode Island's yellowtail flounder restrictions and provisions of a federal fishery management plan). In addition, several United States District Court cases in Florida were recently resolved by stipulated settlements that recognize the state's authority to regulate state registered vessels in the FCZ absent a conflict with federal law. *See Florida v. Baldrige*, No. 83-7071 Civ. (N.D. Fla., *dismissed* Jan. 8, 1985); *Florida v. Baldrige*, No. 83-7380 Civ. (N.D. Fla., *dismissed* Jan. 8, 1985); *Southeastern Fisheries v. Livings*, No. 83-524 Civ. (S.D. Fla. Jan. 4,1985).

Supreme Court could review his jurisdictional arguments, a pretrial decision by this Court could result in adjudication of issues that might be "'dissipated by the final outcome of the case." *Id.* at 572 (Harlan, J., diss.) Finally, the issue presented by Painter in his appeal is reviewable after final judgment and hence does not meet the third criterion for collateral order appeals (i.e., nonreviewability). Accordingly, this appeal should be dismissed.

2. The Issue Presented Does Not Merit This Court's Attention.

As discussed above and articulated more fully below, this appeal does not involve sufficiently important legal issues separate from the merits to justify collateral order review. Moreover, even if this Court were to construe this appeal as a petition for certiorari, the petition should be denied for the same reasons set out above and because major federal questions are not at issue, as discussed below.

A. *The Magnuson Act Recognizes and Provides for Continued State Fisheries Management Beyond Territorial Waters.*

At the time Congress enacted the MFCMA in 1976, the law was well settled that the individual states had jurisdiction over fishery violations beyond their territorial seas, if the state had a legitimate interest in, and sufficient nexus with, the fishing activity. *Skiriotes v. Florida*, 313 U.S. 69 (1941). Both the express language of the MFCMA and its legislative history confirm that Congress was fully aware of the importance of state fisheries management in and beyond state territorial seas and of the need to continue sound state management in the FCZ in the absence of conflicting federal regulatory provisions. *See generally* Committee on Commerce and National Ocean Policy Study, 94th Cong., 2nd Sess., *A Legislative History of the Fishery Conservation and Management Act of 1976* ("Legislative History") 77, 328, 437, 459, 461, 677, 941 (1976). While providing for exclusive federal

fishery management with respect to *foreign* fishing activities, Congress expressly authorized continued state management and enforcement jurisdiction in the FCZ over vessels "registered under the laws" of the states. 16 U.S.C. § 1856(a).[11]

At the time Congress enacted the MFCMA, many coastal states, lke Alaska, had well established fishery management programs in the FCZ, designed to protect and conserve resources valuable to their economies. *Legislative History* at 437, 684, 846. Had Congress intended a drastic curtailment of the states' *Skiriotes* jurisdiction, it would have so indicated. Indeed, this is what the courts concluded in *State v. F/V Baranof*, 677 P.2d 1245 (Alaska 1984), *cert. denied*, 105 S. Ct. 98 (1984); *People v. Weeren*, 607 P.2d 1279, 1286-87 (Cal. 1980), *cert. denied*, 449 U.S. 837 (1980); and *Livings v. Davis*, 465 So. 2d 507 (Fla. 1985). Congress has not acted to overturn Alaska's, California's, or Florida's assertions of jurisdiction in the FCZ, although it could have, had it found the states' actions to be inconsistent with the MFCMA.

B. *Mere Adoption of a Tanner Crab Fishery Management Plan Does Not Trigger Federal Preemption.*

Painter argues that the supremacy clause of the United States Constitution, article II, clause 2, requires preemption of state Tanner crab regulations by virtue of enactment of the MFCMA and the adoption of federal Tanner crab regulations. This argument ignores both the express reservation of the states' *Skiriotes* jurisdiction over vessels registered under the laws of the state under 16 U.S.C. § 1856(a), and the lack of any conflict between state and federal management provisions.

---

[11] 16 U.S.C. § 1856(a) provides:

> 16 U.S.C. § 1856(a): *State jurisdiction.*
>
> (a) In general. — Except as provided in subsection (b) of this section, nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries. No State may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, *unless such vessel is registered under the laws of such State.*

[Emphasis added.]

Federal preemption is found only where there is: (1) a manifest congressional intent to preempt; or (2) where the scheme of federal regulation is so comprehensive as to leave no room for supplementary state regulation; or (3) where the field is one in which the federal interest is so dominant that the federal system is assumed to preclude state law; or (4) where state and federal laws conflict. *See Hillsborough County v. Automated Medical Laboratories, Inc.*, 105 S. Ct. 2371, 2375 (1985). In particular, preemption of the historic police powers of a state will not lightly be inferred. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 147 (1963). None of the above circumstances of preemption exists in the present case. Congressional intent to authorize continued state jurisdiction over state-registered vessels in the FCZ is manifest in 16 U.S.C. § 1856(a). *State v. F/V Baranof*, 677 P.2d 1245 (Alaska 1984), *cert. denied*, 105 S. Ct. 98 (1984). Moreover, mere implementation of a Tanner crab FMP does not trigger federal preemption, absent a conflict, as discussed below.

Although this Court has held that "[f]ederal regulations have no less preemptive effect than federal statutes," *Fidelity Federal Savings and Loan Association v. De La Cuesta*, 458 U.S. 141, 153-54 (1982), a finding of preemption by federal regulation is limited to situations in which the federal administrator *intends* to preempt state law and the federal action is consistent with the federal enabling statute and congressional intent. *Id.* This is not the case with respect to federal Tanner crab regulations, discussed below.

First, there is no indication that either the NPFMC or the Secretary of Commerce intended the Tanner crab FMP or implementing regulations to preempt state law. Both documents are devoid of any expression of intent to preempt. In fact, the FMP assumes continued state regulation in the FCZ. Section 8.3.3.3 of the FMP provides:

> Adoption of the proposed regulatory regime in this plan will be compatible with the State of Alaska's management program for its citizens outside the Territorial Sea fishing for Tanner crab and all U.S. citizens within the Territorial Sea fishing for the same resource.

43 Fed. Reg. 21,200 (1978).

Painter's argument that 50 C.F.R. § 671.1 (1983) constitutes an expression of secretarial intent to preempt state Tanner crab regulations is unfounded. That regulation specifies, in pertinent part, that federal Tanner crab regulations apply "within that portion of the Bering Sea and Gulf of Alaska over which the United States exercises exclusive fishery management authority." *Id.* (Appendix F-1 to Painter's Jurisdictional Statement). This quoted language provides no support for Painter's preemption argument. The language does not address federal preemption of state law but simply mirrors section 102 of the MFCMA, 16 U.S.C. § 1812, in which the United States asserts jurisdiction, *exclusive of other nations,* over fisheries within the FCZ.[12] Section 102 of the MFCMA, and hence 50 C.F.R. § 671.1, must be read in harmony with 16 U.S.C. § 1856(a), which continues state jurisdiction over state registered-vessels in the FCZ.

Second, the Secretary of Commerce, who is charged with implementing the MFCMA *(see* 16 U.S.C. § 1854), has taken the position (through counsel at the Department of Justice as *amicus curiae* in *State v. F/V Baranof,* 677 P.2d 1245 (Alaska 1984), *cert. denied,* 103 S. Ct. 98 (1984), and *Livings v. Davis,* 465 So. 2d 507 (Fla. 1985)), that the MFCMA contemplates continued state jurisdiction over state-registered vessels unless a *conflicting* federal plan is implemented. *See State v. F/V Baranof,* 677 P.2d at 1251; *Livings v. Davis,* 465 So. 2d at 509. This position is underscored by the federal government's participation in a cooperative enforcement agreement for FCZ fisheries, which authorizes, *inter alia,*

---

[12] *See* Appendix E-10--E-11 to Painter's Jurisdictional Statement. The Senate Committee on Commerce, chaired by Senator Magnuson (Sponsor of S. 961, precursor to the MFCMA), clarified that the exclusivity of federal jurisdiction in Secs. 101 and 102 of S. 961 referred to *foreign* nations, not to the several states:

> This authority [exclusive federal jurisdiction in the FCZ] is exclusive in the sense that *no other nation* may regulate fishing within the zone, although vessels of other nations may be allowed to engage in fishing, in accordance with the Act, within the zone.

Legislative History at 677. [Emphasis added.]

federal agents to enforce "state fishing laws and regulations which implement or complement NPFMC management plans."[13] This agreement manifests the interpretation, by the federal agency charged with MFCMA implementation, that the Act and the existence of an FMP and implementing regulations do *not* preempt consistent state regulations.

That the Secretary of Commerce does not agree with the preemption theory presented by appellant is also evidenced by a 1981 legal opinion from NOAA general counsel, which states in pertinent part (emphasis added):

> This [16 U.S.C. § 1856(a)] is a critical provision since it evidences the Congressional decision to assert federal jurisdiction in the FCZ *without fully occupying the field and thereby preserves to the states the authority to regulate their own registered vessels.* Of course, given the comprehensive nature of the federal regime, if there were any *actual conflict* between federal and state regulations directly or indirectly affecting fishing in the FCZ, the federal regulations would prevail even as to state registered vessels.[14]

In short, federal Tanner crab regulations fail to reflect any intent to preempt consistent state provisions in the FCZ. Moreover, any administrative effort to dissolve Alaska's *Skiriotes* jurisdiction absent any conflict with federal law would be incompatible with congressional intent, discussed in section 2A *supra*. *See Fidelity Federal Savings and Loan Association*, 458 U.S. 141, 153-54 (1982). Painter's references to selective portions of the MFCMA legislative history (Jurisdictional Statement at 11-13), provide no basis for inferring congressional intent to extinguish the states' *Skiriotes*

---

[13] Cooperative Enforcement Agreement Between the Government of the United States and the State of Alaska, dated Dec. 10, 1978 (Appendix I of Appellant's Jurisdictional Statement, at I-22).

[14] NOAA General Counsel Op. No. 93 (Jan. 19, 1981) at 1-6193. Appendix G hereto provides, for the Court's convenience, the pertinent sections of the opinion. The opinion is too lengthy to reproduce in its entirety.

jurisdiction, as is evident from a careful examination of the cited comments in the full context of the legislative history, discussed below.

First, Painter asserts that section 104 of H.R. 200 and section 205 of S. 961 manifested agreement by the House and Senate that states have no jurisdiction in the FCZ. This claim is supported neither by the plain language of the bills nor by the committee reports.[15] The two bill sections do not address *Skiriotes* jurisdiction, but merely clarify that the respective bills would not change the status quo of sovereign state jurisdiction. Nothing in the legislative history of the MFCMA

---

[15] Section 104 of H.R. 200 provided:

> Sec. 104. STATE JURISDICTION.
>
> Nothing in this Act shall be construed —
>
> (1) as extending the jurisdiction of any State to any natural resource beneath and in the water within the zone;
>
> (2) as diminishing the jurisdiction of any State over any natural resource beneath and in its internal waters; or
>
> (3) except as may be provided pursuant to section 309, as diminishing the jurisdiction of any State to any natural resource beneath and in the waters of the territorial sea of the United States.

Section 309 of H.R. 200 provided, in pertinent part:

> Sec. 309. STATE JURISDICTION.
>
> (a) IN GENERAL. — Except as provided in subsection (b) nothing in this Act shall be construed as extending or diminishing the jurisdiction of any State seaward of the coastline of the United States.
>
> (Subsection (b) of Sec. 309 provided for federal regulation of certain fisheries within the states' territorial seas, where necessary to insure the effectiveness of an FMP.)

Section 205 of the Senate amendment (S. 961) provided:

> Sec. 205. Nothing in this Act shall be construed to extend the jurisdiction of any state over any natural resources beneath and in the water beyond its seaward boundaries, or to diminish the jurisdiction of any State over any natural resource beneath and in the waters within its boundaries.

Legislative History at 135, 204.

suggests that Congress intended to alter the well established jurisdiction of states over fisheries beyond territorial seas, articulated in *Skiriotes*. *See* section 2A, *supra*.

Second, Painter argues that certain comments made by Senator Gravel during Senate debates on S. 961 show that Congress intended to create a zone of exclusive federal jurisdiction in the FCZ. This conclusion does not follow. Senator Gravel's proposal was to grant to the several states *primary* jurisdiction over fishing in the FCZ (not, as Painter suggests, to recognize concurrent state management authority in the FCZ). *See Legislative History* at 412-14, 422, 437, 467-71. Under Senator Gravel's amendment, the federal role would have been merely to approve management programs developed by the states. *Id.* Congress' rejection of this proposal to allow primary state jurisdiction in the FCZ does not manifest any intent to preclude concurrent state regulation of state-registered vessels as long as state regulation is consistent with the federal management scheme.

Likewise, Painter's references to comments by Senators Stevens and Magnuson do not support his preemption theory. In context, the statements of Senator Stevens (cited at page 11 of the Jurisdictional Statement) related to an amendment proposed by him to clarify that S. 961 would not enlarge or diminish the state's sovereign jurisdiction over territorial seas and fisheries. Senator Gravel, who advocated granting the states *primary* jurisdiction over FCZ fisheries, noted that the State of Alaska was exercising its authority (i.e. *Skiriotes* jurisdiction) over certain fisheries beyond the three mile territorial sea and suggested that this be addressed in the legislation. Senator Stevens clarified repeatedly that extraterritorial (i.e., *Skiriotes)* jurisdiction was not the point of his amendment, stating:

> We are not trying to resolve that. We are trying to reassure the States that nothing in this act is intended to take away from the State any jurisdiction it has now.

Legislative History at 459; *see also id.* at 460.

Similarly, the comments of Senator Magnuson do not address *Skiriotes* jurisdiction but are also directed at Senator Gravel's desire to see the states have *primary* jurisdiction over FCZ fisheries. Senator Magnuson simply emphasized that the bill (S. 961) would continue primary state management in territorial waters, stating:

> We wish to protect the right of the States to do what they think is right under the law which now exists and [sic] within the 3 miles. That is all this [S. 961] does.

Legislative History at 463; *see also id.* at 465.[16] While calling for national fisheries management standards in the FCZ, Senator Magnuson at no point indicated any intent to abolish *Skiriotes* jurisdiction, if state and federal regulations are consistent. In short, taken in context, the MFCMA legislative history does not manifest congressional intent to deprive states of their traditional *Skiriotes* jurisdiction.

Finally, Painter attempts to bolster his preemption theory by suggesting that the Alaska Supreme Court's decision in *State v. F/V Baranof*, 677 P.2d 1245 (Alaska 1984), *cert. denied*, 103 S. Ct. 98 (1984), was premised on the fact that, in that case, no federal king crab regulations had been adopted. Painter thereby intimates that a contrary decision would have resulted had there been a king crab FMP in place. This is not the case. Although there was no FMP for king crab in *Baranof*, this fact was not critical to the court's reasoning and its conclusion that the MFCMA does not wholly occupy the field of FCZ fisheries. In fact, the *Baranof* court specifically noted that, since initiation of the case, the NPFMC had prepared a king crab FMP that wholly incorporated the state's regulatory scheme; the court found this to be further "strong evidence that the Alaskan regulatory regime does not stand as an obstacle to the accomplishment and execution of the purpose of the FCMA." *Id.* at 1251.

---

[16] Painter's references to 1983 amendments to the MFCMA, which resolved certain jurisdictional anomalies, are equally unavailing. The 1983 amendments and committee report comments do not address *Skiriotes* jurisdiction under 16 U.S.C. § 1856(a) but merely clarify which areas will be construed as being within territorial seas for management purposes.

In summary, Painter fails to raise any serious argument that the MFCMA or federal Tanner crab regulations preempt consistent state regulations. Moreover, as discussed below, there are strong policy considerations that weigh in favor of continued state enforcement.

C. *Continued State Enforcement of Consistent State Regulations Furthers the Purposes and Policies of the Magnuson Act.*

Alaska has a recognized legitimate interest in Tanner crab, which migrate freely across territorial boundaries, and in its Tanner crab fishery.[17] Vessels that engage in the Tanner crab fishery and that are subject to state vessel registration laws have a close nexus to Alaska. As the Alaska Supreme Court stated in *State v. Bundrant*, 546 P.2d 530, 556 n.106 (Alaska 1976), *appeal dismissed sub nom. Uri v. Alaska*, 429 U.S. 806 (1976):

> Bering Sea crabbers daily make use of Alaskan territorial waters and facilities, and probably could not continue to crab in the area without using Alaskan shore based facilities.

Accord: F/V American Eagle v. State, 620 P.2d 657 (Alaska 1980), *appeal dismissed*, 454 U.S. 1130 (1981).

From a pragmatic perspective, denial of state jurisdiction over Tanner crab cases involving nonconflicting state regulations in the FCZ would defeat the conservation and management purposes of the MFCMA. As recognized in the Cooperative Enforcement Agreement, the state already has a substantial investment in enforcement personnel, vessels, equipment, and patrol aircraft.[18] State courts exist in Dutch Harbor, Dillingham, Naknek, Kodiak, and elsewhere near the fishing grounds and in close proximity to witnesses, equipment, and enforcement personnel, and thus provide a convenient forum for issuance of warrants, adjudication of

---

[17] *See* n.1 *supra.; see also* 43 Fed. Reg. 21,199 (1978).

[18] Appendix I to Appellant's Jurisdictional Statement, at I-2--I-4.

issues relating to seizure of vessels and equipment, and trials.[19] Additionally, over the years state courts have developed a familiarity with and expertise regarding state fisheries management laws, a fact Congress surely recognized in allowing states continued management under the MFCMA.[20] To conclude that the state's jurisdiction over Tanner crab fishing is automatically preempted merely by adoption of nonconflicting federal regulations applicable in the FCZ would defeat the goals of the MFCMA itself, by placing needless roadblocks to enforcement, thereby undermining efforts to conserve and manage the fishery. *See generally* 16 U.S.C. § 1801(b).

CONCLUSION

For the reasons stated above, this appeal should be summarily dismissed. If considered as a petition for certiorari, this Court should not exercise its review authority because the order appealed from is not within the collateral order exception and because Painter does not raise substantial federal questions. Alternatively, the decision of the Alaska Court of Appeals should be summarily affirmed.

DATED this 29th day of October, 1985.

Respectfully submitted,

HAROLD M. BROWN
ATTORNEY GENERAL

SARAH ELIZABETH MCCRACKEN
ASSISTANT ATTORNEY GENERAL
Counsel for State of Alaska for Appellee

---

[19] The federal courts in Alaska, in contrast, are located in Anchorage and Fairbanks, more than 300 miles from the Bristol Bay fishing grounds, although there are part-time federal magistrates in Kodiak, Juneau, and Ketchikan.

[20] As the Alaska Supreme Court noted in *State v. F/V Baranof*, 677 P.2d at 1253, practical considerations in Alaska favor interpreting the MFCMA to allow continued state court jurisdiction over fisheries cases where state courts have traditionally interpreted and applied state law.

APPENDIX A

5 AAC 35.005 (1983)

5 AAC 35.005. STATISTICAL AREAS ESTABLISHED. (a) For the tanner crab fishery, there are established the following statistical areas with the following code letters:

Code letter

A- Southeastern Alaska-Yakutat area, comprised of the waters specified in sec. 100 of this chapter.

E- Prince William Sound area, comprised of the waters specified in sec. 300 of this chapter.

H- Cook Inlet area, comprised of the waters specified in sec. 400 of this chapter.

J- Westward area, comprised of the waters specified in sec. 500 of this chapter.

(b) Each statistical area consists of:

(1) a registration area, comprised of all the waters within the stastistical area which are territorial waters of Alaska; and (2) an adjacent seaward biological influence zone, comprised of all the waters within the statistical area which are not part of the registration area.

(c) Registration areas are areas in which the department shall apply conservation and management regulations in order to protect and maintain the tanner crab resources of the state.

(d) Adjacent seaward biological influence zones are areas which the department shall utilize to obtain biological and fishing effort data and other information necessary for the formulation of comprehensive and effective conservation and management regulations governing

crab resources inhabiting the registration area. However, regulations governing the registration area will also be applied in the adjacent seaward biological influence zone consistent with sec. 010 of this chapter.

Authority: AS 16.05.251

5 AAC 35.500 (1983):

ARTICLE 8.

STATISTICAL AREA J (WESTWARD)

REGULATIONS FOR REGISTRATION AREA

5 AAC 35.500. DESCRIPTION OF STATISTICAL AREA. Statistical area J includes all Pacific Ocean waters south of the latitude of Cape Douglas (58° 52' N. lat.), west of the longitude of Cape Fairfield (148° 50' W. long.), east of 172° E. long. and shoreward of the 400 fathom (732 m) depth contour and all Bering Sea waters east of 172° E. long.

Authority: AS 16.05.251(a)(2)

5 AAC 35.505(a) (1983):

5 AAC 35.505. DESCRIPTION OF DISTRICTS. (a) Kodiak district: all waters south of the latitude of Cape Douglas (58° 52' N. lat.), west of the longitude of Cape Fairfield (148° 50' W. long.) and east of the longitude of Cape Kumlik (157° 27' W. long.);

(1) Northeast section: all waters northeast of a line extending 145° from the easternmost tip of Cape Chiniak, east of a line from the northernmost tip of Inner Point to the southernmost tip of Afognak Point, east of 152° 30' W. long. in Shuyak Strait and east of the longitude of the northernmost tip of Shuyak Island (152° 20' W. long.);

(2) Eastside section: all waters southwest of a line extending 145° from the easternmost tip of Cape Chiniak, northeast of a line extending 168° from the easternmost tip of Cape Barnabas and

Old Harbor Narrows east of 153° 16' W. long.;

(3) Southeast section: all waters southwest of a line extending 168° from the easternmost tip of Cape Barnabas and east of a line extending 222° from the southernmost tip of Cape Trinity;

(4) Southwest section: all waters west of a line extending 222° from the southernmost tip of Cape Trinity, south of a line from the westernmost tip of Cape Ikolik to 57° 15' N. lat., 155° 30' W. long. to the southernmost tip of Cape Kilokak and east of the longitude of Cape Kilokak (156° 19' W. long.);

(5) Semidi Island section: all waters west of the longitude of Cape Kilokak (156° 19' W. long.) and east of the longitude of Cape Kumlik (157° 27' W. long.);

(6) Westside section: all waters north of a line from the westernmost tip of

Cape Ikolik, east of a line from 57° 15' N. lat., 155° 30' W. long. to 58° N. lat., 154° W. long. to 58° 51' N. lat., 152° 45' W. long., west of a line from the northernmost tip of Inner Point to the southernmost tip of Afognak Island, west of 152° 30' W. long. in Shuyak Strait and west of the longitude of the northernmost tip of Shuyak Island (152° 20' W. long.);

(7) North Mainland section: all waters north of 58° N. lat. and west of a line from 58° 51' N. lat., 152° 45' W. long. to 58° N. lat., 154° W. long.;

(8) South Mainland section: all waters south of 58° N. lat., west of a line from 58° N. lat., 154° W. long. to 57° 15' N. lat., 155° 30' W. long. and north of a line from the southernmost tip of Cape Kilokak to 57° 15' N. lat., 155° 30' W. long.

5 AAC 35.510(1) (1983):

5 AAC 35.510. FISHING SEASONS. Male tanner crab may be taken only as follows:

(1) in the Kodiak district, from 12:00 noon February 10 through 12:00 noon April 30, except in that portion of the Kodiak district from the longitude of Kilokak Rocks (156° 20' 13" W. long.) to the longitude of Cape Kumlik (156° 27' W. long.) tanner crab may be taken only from 12:00 noon February 10 through May 15;

APPENDIX B

IN THE DISTRICT COURT
OF THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT, KODIAK, ALASKA

STATE OF ALASKA

Plaintiff

vs.

THEODORE PAINTER, JR.

DOB: 02-06-47

Defendant.

---

6 COUNTS MISDEMEANOR
CRIMINAL COMPLAINT
No. 3K0-84-31 Cr.
COMMERCIAL FISHING
CLOSED SEASON
5AAC 35.510(1)

Complainant, Sergeant CRAIG SMITHSON, Fish & Wildlife Protection Officer, personally appearing before me and being duly sworn, states that on or about the 8th day of November, 1983, at or near Kodiak, in the Third Judicial District, State of

COUNT I:

Alaska, THEODORE PAINTER, JR., skipper of the fishing vessel ALASKA TROJAN, did

unlawfully commercial fish for Tanner crab; to wit: That he did take Tanner crab within the Kodiak District during a closed season.

All of which is contrary to and in violation of 5AAC 35.510(1) and against the peace and dignity of the State of Alaska.

COUNT II: COMMERCIAL FISHING CLOSED SEASON 5AAC 35.510(1)

THEODORE PAINTER, JR., skipper of the fishing vessel ALASKA TROJAN on November 13, 1983, at or near Kodiak, did unlawfully commercial fish for Tanner crab; to wit: that he did take Tanner crab within the Kodiak District during a closed season.

All of which is contrary to and in violation of 5AAC 35.510(1) and against the peace and dignity of the State of Alaska.

COUNT III: COMMERCIAL FISHING CLOSED SEASON 5AAC 35.510(1)

THEODORE PAINTER, JR., skipper of the fishing vessel ALASKA TROJAN on November

16, 1983, at or near Kodiak, did unlawfully commercial fish for Tanner crab; to wit: that he did take Tanner crab within the Kodiak District during a closed season.

All of which is contrary to and in violation of 5AAC 35.510(1) and against the peace and dignity of the State of Alaska.

/s/ Craig Smithson
(SIGNATURE OF COMPLAINANT)

Sworn to and subscribed before me this 10th day of January, 1984.

/s/ Dennis Nelson
Magistrate

(SEAL)

COUNT VI [sic]: COMMERCIAL FISHING CLOSED SEASON 5AAC 35.510(1)

THEODORE PAINTER, JR., skipper of the fishing vessel ALASKA TROJAN on November 17, 1983, at or near Kodiak, did unlawfully commercial fish for Tanner crab; to wit: that he did take Tanner crab within the Kodiak District during a closed season.

All of which is contrary to and in violation of 5AAC 35.510(1) and against the peace and dignity of the State of Alaska.

COUNT V: COMMERCIAL FISHING CLOSED SEASON 5AAC 35.510(1)

THEODORE PAINTER, JR., skipper of the fishing vessel ALASKA TROJAN on Decenber 2, 1983, at or near Kodiak, did unlawfully commercial fish for Tanner crab; to wit: that he did take Tanner crab within the Kodiak District during a closed season. All of which is contrary to and in violation of 5AAC 35.510(1) and against the peace and dignity of the State of Alaska.

COUNT IV [sic]: COMMERCIAL FISHING CLOSED SEASON 5AAC 35.510(1) Emergency Order No. 4-S-8-81 [sic].

THEODORE PAINTER, JR., skipper of the fishing vessel ALASKA TROJAN on April 6, 1981, at or near Kodiak, did unlawfully commercial fish for Tanner crab; to wit:

that he did take Tanner crab within the Kodiak District during a closed season. All of which is contrary to and in violation of 5AAC 35.510(1); emergency order number 4-S-9-81 and against the peace and dignity of the State of Alaska.

This complaint is based upon the investigation of the complainant. It is further based upon:

1. Reference Counts I thru V: The observations of Fish and Wildlife Protection Officers SCOTT GIBBENS and RICHARD DEREMER who observed the fishing vessel ALASKA TROJAN Pulling gear within the closed waters of the Kodiak District on November 17, 1983, and upon the vessels log books which revealed that between November 8 and December 2, 1983 approximately 104 Tanner crab pots were pulled within the closed waters of the Kodiak Tanner Crab District and that an estimated 11,304 pounds of Tanner crab valued at 13,565.28 dollars

was taken from the gear and sold to Alaska Fresh Seafoods in Kodiak, Alaska by THEODORE PAINTER, JR.

2. Reference Count IV [sic]: The log books of the F/V ALASKA TROJAN revealed that THEODORE PAINTER, JR. took approximately 1,285 Tanner crab from the Kodiak area northeast section with an estimated value of 2,816 dollars after the area had closed by emergency order on April 6, 1981 at 12:00 noon.

/s/ Craig Smithson
(SIGNATURE OF COMPLAINANT)

Sworn to and subscribed before me this 10th day of January, 1984.

/s/ Dennis Nelson
Magistrate

APPENDIX C

AS 16.05.060:

Sec. 16.05.060. Emergency openings and closures. This chapter does not limit the power of the commissioner or an authorized designee, when circumstances require, to summarily open or close seasons or areas or to change weekly closed periods on fish or game by means of emergency orders. An emergency order has the force and effect of law after field announcement by the commissioner or an authorized designee. An emergency order adopted under this section is not subject to the Administrative Procedure Act (AS 44.62). (§ 12 art I ch 94 SLA 1959; am § 1 ch 4 SLA 1963)

AS 16.05.475:

Sec. 16.05.475. Registration of fishing vessels. (a) A person may not employ a fishing vessel in the water of Alaska unless it is registered under the

laws of the state. Vessels registered under the laws of another state, and persons residing in another state, are not excused from this provision.

(b) The term "employ", as used in this section, shall be defined by the Board of Fisheries through the adoption of regulations under the Administrative Procedure Act (AS 44.62). The definition may include any activities involving the use or navigation of fishing vessels.

(c) The term "registered under the laws of the state", as used in this section, shall be defined by the Board of Fisheries through the adoption of regulations under the Administrative Procedure Act (AS 44.62). The definition may include any existing requirements regarding regis tration, licenses, permits, and similar matters imposed by law or regulation together with modifications of them and with any additional requirements the

board finds laws necessary to maximize the authority of the state to apply and enforce fisheries regulations under the Fishery Conservation and Management Act of 1976 (P.L. 94-265, 90 Stat. 331, 16 U.S.C. 1801 et seq.).

(d) The term "fishing vessel", as used in this section, means any vessel, boat, ship, or other craft which is used for, equipped to be used for, or of a type which is normally used for

(a) fishing, or

(2) aiding or assisting one or more vessels at sea in the performance of any activity relating to fishing, including, but not limited to, preparation, supply, storage, refrigeration, transportation, or processing. (§ 7 ch 105 SLA 1977)

AS 16.05.720(a):

Sec. 16.05.720. Penalties. (a) Except as modified by (c) of this section,

a person who violates AS 16.05.480 - 16.05.690 or the regulations of the department pertaining to commercial fisheries is guilty of a misdemeanor and upon conviction is punishable by a fine of not more than $5,000, or by imprisonment for not more than one year, or by both. . . . (§ 12 art III ch 94 SLA 1959; am § 24 ch 131 SLA 1960; am §§ 1, 2 ch 124 (SLA 1974))

AS 22.07.030:

Sec. 22.07.030. Review by supreme court. A party may apply to the supreme court for review of a final decision of the court of appeals in accordance with AS 22.05.010 and rules adopted by the supreme court. Review is in the discretion of the supreme court as set out in AS 22.05.-010(d). In this section, "final decision" means a decision or order, other than a

dismissal by consent of all parties, that closes a matter in the court of appeals. (§ 1 ch 12 SLA 1980)

APPENDIX D

Alaska Rule of Appellate Procedure 301(a):

PART III. PETITION FOR HEARING

Rule 301. Scope of Part Three.

(a) Part Three of these rules (Rules 301 through 305) applies to requests to the supreme court to exercise its discretionary jurisdiction provided in AS 22.05.010(d) to review decisions of the court of appeals.

Alaska Rule of Appellate Procedure 302(a):

Rule 302. Petition for Hearing - When Permitted.

(a) From the Court of Appeals.

(1) A peititon for hearing may be filed in the supreme court with respect to any final decision of the court of appeals, as defined in AS 22.07.030. "Final decision" includes any decision or order of the court of appeals, other that a dismissal by consent of all parties,

which closes a matter in the court of appeals, whether or not it contemplates further proceedings in a trial court. Unless specified otherwise in the particular order in question, it includes but is not limited to, opinions, memorandum opinion [sic] and judgments, orders denying petitions for review, orders denying petitions for hearing filed under AS 22.07.020 (e), dismissals on motion of the appellee or respondent, and sua sponte dismissals pursuant to Rule 511.5 or another rule.

(2) When a petition for hearing is filed under this subsection, for purposes of Part Three the supreme court is the "court of discretionary review," the court of appeals is the "imtermediate appellate court," and the court which entered the judgment which was appealed to the intermediate appellate court is the "trial court."

Alaska Rule of Appellate Procedure 304:

Rule 304. Grounds for Granting Petition for Hearing.

The granting of a petition for hearing is not a matter of right, but is within the discretion of the court of discretionary review. The following, while neither controlling nor fully measuring that court's discretion, indicates the character of reasons which will be considered:

(a) The decision of the intermediate appellate court is in conflict with a decision of the Supreme Court of the United States or the supreme court of the state of Alaska, or with another decision of the court of appeals.

(b) The imtermediate appellate court has decided a significant question concerning the interpretation of the Constitution of the United States or the Constitution of Alaska, which question has

not previously been decided by the supreme court of the state of Alaska.

(c) The intermediate appellate court has decided a significant question of law, having substantial public importance to others than the parties to the present case, which question has not previously been decided by the supreme court of the state of Alaska.

(d) Under the circumstances, the exercise of the supervisory authority of the court of discretionary review over the other courts of the state would be likely to have significant consequences to others than the parties to the present case, and appears reasonably necessary to further the administration of justice. (Supreme Court Order 439 effective November 15, 1980)

Alaska Rule of Criminal Procedure 43(a):

Rule 43. Dismissal.

(a) By Prosecuting Attorney. The prosecuting attorney may file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal shall not be filed during the trial without the consent of the defendant.

APPENDIX E

IN THE SUPREME COURT
OF THE STATE OF ALASKA

THEODORE PAINTER, JR.,
Petitioner,

vs.

STATE OF ALASKA,
Respondent.

Supreme Court No. S-885

O R D E R

[Filed and Entered Appellate Courts of the State of Alaska - Jul 30 1985]

Court of Appeals No. A-452
Superior Court No. 3KO 84-31 Cr.

Before: Rabinowitz, Chief Justice, Matthews, and Moore, Justices. [Burke and Compton, Justices, not participating.]

On consideration of the motion for reconsideration of the order of an individual justice of June 19, 1985 denying a motion a stay of remand pending appeal to the United States Supreme

Court, filed on July 2, 1985, and the opposition to the motion, filed on July 5, 1985,

IT IS ORDERED:

The motion for reconsideration is denied.

Entered by direction of the court at Anchorage, Alaska on July 25, 1985.

CLERK OF THE SUPREME COURT

/s/ David A. Lampen
DAVID A. LAMPEN

APPENDIX F

FORMAL LEGAL OPINION
OFFICE OF THE GENERAL COUNSEL
NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION

NO. 93

Supersession and Jurisdictional Operations Under § 306 of the Magnuson Act, 16 U.S.C. §1856.

Statues Interpreted: Section 306, Magnuson Fishery Conservation and Management Act, 16 U.S.C. §1856.

Written by: Reginald Whitt, GCF, and Jay S. Johnson, GCF

Date: 29 January 1981

Summary: The opinion discusses traditional forms of State management of natural resources within and beyond State boundaries and analyzed [sic] how these have been affected by the enactment of the Magnuson Act and subsequent promulgation of fishery management plan regulations.

Questions Presented:

(1) Under what circumstances may federal fisheries regulations supersede State fisheries laws?

(2) To what extent may States regulate fishing in the fisheries conservation zone (FCZ) established under the Magnuson Fishery Conservation and Management Act, 16 U.S.C. §§1801 et seq.?

Conclusions:

(1) Federal Fisheries regulations will supersede State authority over fishing:

(a) in the FCZ under the supremacy clause of the United States Constitution except as provided in (2), below, and

(b) in the territorial sea after an administrative finding that State action substantially and adversely affects accomplishment of a fishery management plan (FMP) for

a fishery predominately fished in the FCZ.

(2) A State may regulate the fishing of vessels in the FCZ only when:

(a) the vessel is "registered" under the laws of the same State; and

(b) such regulation is not inconsistent with any applicable federal regulation; and

(c) the State has a legitimate interest in the fishery; and

(d) the State regulation neither discriminates against citizens of other States nor unduly burdens the interstate commerce of the United States.

. . . .

(c) State and Federal Jurisdiction Under the Magnuson Act.

(1) The Nature of the Act.

In the Magnuson Act Congress exercised its commerce power to prohibit

foreign fishing within the boundaries of any State and to establish a comprehensive national regime for federal regulation of specified fisheries resources in the FCZ. This scheme was premised on the conclusion that a national program for fisheries conservation and management was needed, §1801(a)(6), and would operate under exclusive federal authority in and beyond the FCZ, §§1801(b)(1) and 1812, subject to the reservation of State authority specified within the Act itself, §1856.

. . . .

(ii) The Character of Supersession under the Magnuson Act.

(a) §1856(a), sentence 1.

. . . .

(b) §1856(a), sentence 2.

The second sentence of §1856(a) provides:

No State may directly or indirectly regulate any

> fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State.

This is a critical provision since it evidences the Congressional decision to assert federal jurisdiction in the FCZ without fully occupying the field and thereby preserves to the States the authority to regulate their own registered vessels. Of course, given the comprehensive nature of the Federal regime, if there were any actual conflict between federal and State regulations directly or indirectly affecting fishing in the FCZ, the federal regulations would prevail, 22 U.S. (9 Wheat.) 1, 210 (1824). Rath Packing, supra. The Alaska Supreme Court, in dicta, has recently acknowledged this result with respect to federal regulations

promulgated under the Magnuson Act. American Eagle, supra, n.10.

Registration as used in §1856(a) represents an alteration of prior law regarding the legitimate exercise of extraterritorial State jurisdiction under Skiriotes, supra, and Bundrant, supra. See (b)(i), (ii) and (iii). No longer may a State impose its fisheries laws in the absence of conflicting federal regulation in the FCZ based merely upon a showing of legitimate interests in the resources and the citizenship of the persons fishing or sufficient contacts between the State and noncitizens. The Magnuson Act now requires that the vessel whose fishing is to be subjected to State regulation must be "registered under the laws of such State."

(i) Registration.

. . . .

(ii) The Scope of State Jurisdiction in the FCZ.

The second sentence of §1856(a) restricts the valid exercise of State police power over FCZ fishing to situations in which:

(A) the State regulation is not inconsistent with any applicable federal fishery regulation: i.e.,

(1) there are no federal regulations for the subject fishery; or

(2) compliance with both federal and State regulation is not impossible; or

(3) the State regulation does not impede the complete accomplishment of the goals of applicable federal regulations; and

(B) the vessel from which the fishing took place is "registered" under State law; and

(C) the State's legitimate interest in its territorial sea resources justifies the direct or indirect effect of its regulation of fishing in the FCZ; and

(D) the regulation neither discriminates against vessels from other States nor constitutes an undue burden on interstate commerce or any other federal right or authority.

(iii) Police Power in the Absence of Applicable Federal Regulation.

. . . .

(iv) State Jurisdiction When Federal Regulations Have Been Promulgated.

The Weeren, Nelson and American Eagle courts are in acord [sic] that promulgation of federal regulations regarding any fishery will supersede any conflicting State regulation of FCZ fishing. E.g., Weeren, 26 Cal.3d at ___, 14 ERC at 1255; American Eagle at n.10. This supersession is automatic under the supremacy clause, U.S. Const. art VI, cl.2, and does not require the secretarial findings necessary under §1856(b) for federal regulation within a State's territorial sea.

. . . .